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The Law School

THE MAGAZINE OF
NEW YORK UNIVERSITY
SCHOOL OF LAW
AUTUMN 2004



Partners in Crime

On Our Cover

Criminal Law Personified: Here's how to make a professor proud. NAACP Legal Defense Fund lawyer, Vanita Gupta ('01), the subject of *Turning the Tables in Tulia*, on page 53, confers with co-counsel during the course of her high-stakes bid to free 35 wrongly-convicted citizens of Tulia, Texas. The lawyer facing Gupta in the sketch is another NYU School of Law graduate, Adam Levin ('97), who took the case pro bono for D.C. firm Hogan & Hartson. Levin is now one of the firm's senior associates.

Artist Marilyn Church has covered famous courtroom spectacles including trials involving Robert Chambers, John Gotti, and Jean Harris of Scarsdale Diet fame—since the seventies. Her work is often on ABC and in *The New York Times*, and has been published in *Fortune*, *Esquire*, *Time*, and *Newsweek*.

Message from Dean Revesz

The Law School continues to astonish me with its vitality. Having completed my second year of stewardship as dean, I feel so grateful for the privilege of learning and interacting with the various communities that comprise the NYU School of Law.

In one extraordinary week last spring, for example, I first welcomed James Wolfensohn, the president of the World Bank, to an important conference on Human Rights and Development. Next, I listened to my colleague Barry Friedman, one of the nation's leading constitutional theory experts, deliver the inaugural chair lecture for the Jacob D. Fuchsberg Professorship of Law, established by Law School Trustee Alan Fuchsberg ('79) and his family in honor of his father, a distinguished judge on the New York Court of Appeals, who graduated in 1935.

I moved on to greet the judges of the U.S. Court of Appeals for the Second Circuit, who had convened to hear Professor Noah Feldman report on his experience serving as a senior advisor on constitutional law to the Coalition Provisional Authority in Iraq, before heading over to the eighth annual Hauser Lecture on international humanitarian law featuring Lord Paddy Ashdown, the high representative for Bosnia and Herzegovina. The lecture, organized by long-time faculty member Theodor Meron, who is currently on leave to serve as the president of the International Criminal Tribunal for the former Yugoslavia, drew a distinguished crowd. Antonio Cassese, also a judge on the ICTY and former President of the tribunal from 1993 to 1997 was there, as was Richard Goldstone, a judge on South Africa's Constitutional Court and former chief prosecutor for the ICTY. My week was topped off when I presented Rita Hauser ('59) with the Vanderbilt Award; appropriately, the pathbreaking Hauser Global Law School Program, co-founded by Rita and her husband, Gustave (LL.M. '37), had made the indelible Ashdown session possible. And then it was on to the next week, which brought similar intellectual excitement.

For those of us who work and study on Washington Square South, the constant buzz of activity makes every day memorable. At any given time, there are workshops, roundtables, panel discussions and lectures with distinguished guests attended by students, faculty, alumni, and practitioners. I hope that the *Student Spotlight*, *Around the Law School*, and *Alumni Activities* sections in this issue will convey some of that feeling. Our new opening section, *Notes & Renderings*, should get you quickly up to speed on some of the highlights. Be sure to note the exciting news that we successfully completed our \$30 million endowment campaign for the Root-Tilden-Kern Program, the leading public interest program in the country, which just celebrated its 50th anniversary. Thanks to the incredible generosity of Jerome Kern ('60), and many others, we will, once again, offer each entering class 20 full-tuition scholarships.

The most tangible physical milestone this year—the opening of Furman Hall, the first new academic building on campus since Vanderbilt Hall was built more than 50 years ago—serves as the editorial gateway to the issue's longer pieces including *Creative Counsel*, our profile of the accomplished and affable Burt Neuborne, the John Norton Pomeroy Professor of Law, written by Joseph Berger of *The New York Times*. We are also proud to showcase Vanita Gupta ('01), whose tale is proof positive of the outstanding training in criminal law available to NYU School of Law students. A profile of this alumna and her battle to free 35 wrongly convicted Texans is embedded in the cover story on our criminal law program, *Partners in Crime*, written by Jodi Balsam ('86). This article continues the tradition of focusing on one substantive area of law in which the NYU School of Law has extraordinary strengths. I am confident that an independent peer review would conclude that, among the leading law schools in the country, we have the strongest criminal law program. Our international and environmental law programs, which were the focus of *The Law School* in the past two years, meet the same standard.

I hope you will agree that this issue reflects the intellectual energy and vibrancy of the Law School itself. Please do weigh in with your verdict at law.magazine@nyu.edu. We hope to hear from you.



A handwritten signature in blue ink that reads "Richard Revesz". The signature is fluid and cursive.

Richard Revesz

The Law School

THE MAGAZINE OF NEW YORK UNIVERSITY SCHOOL OF LAW

The Architecture of a Law School's Vision

Furman Hall, the first new construction on campus since Vanderbilt Hall some 50 years ago, makes a grand entrance.

By Joanna Goddard

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Creative Counsel: Professor Burt Neuborne

Meet this rare blend of litigating academic and imaginative lawyer.

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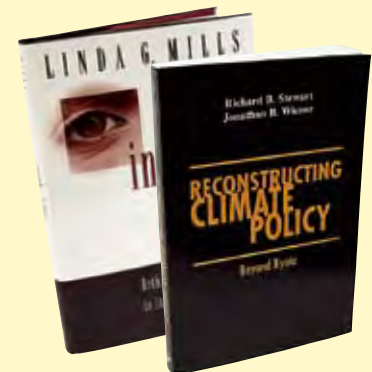
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Students start new law journals, explore issues ranging from international law to courtroom technology to water use, and even squeeze in some fun.



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Last year's cover story, *Training Environmental and Land Use Lawyers for the New Millennium*, focused on the environmental program; this year, we look at a few new environmental law projects: Regulating Regulators; Danube Clean-up; Bait and Switch?

The 2002 magazine took a close look at the international area in *International Law for the Future*; a report, this time, on the forward-thinking Center on Law and Security's high-level conference, "Prosecuting Terrorism: The Global Challenge."



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Send your comments to
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Partners in Crime

The Criminal Law Program boasts the sharpest criminal minds in the country—a phalanx of professors who value the lively exchange that distinguishes their intellectual community. It's simply the best place to study criminal law—no offense.

By Jodi Balsam ('86)

Plus: *Turning the Tables in Tulia* on page 53, a profile of graduate Vanita Gupta ('01), who took what she learned and steered an NAACP Legal Defense Fund appeal that would ultimately free 35 innocent people from jail.

By Dan Bell

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Awards, anniversaries, and generous donations (along with consequential achievements) are celebrated.



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Professor Jack Rakove, who visited the NYU School of Law last year from Stanford, vetted *Liberty's Kids*, an acclaimed and star-studded PBS cartoon, for historical accuracy.

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The annual ritual is celebrated as another academic cycle is completed.

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Law School alumni, faculty, donors, and family members stand proudly with their brand-new graduates.



Notes & Renderings

A Supreme Achievement

For the first time, four recent NYU School of Law graduates were selected to clerk at the United States Supreme Court in the same term.

Justice Sandra Day O'Connor chose Joel Beauvais ('02) and Theano Evangelis ('03)—also the first time two NYU alumni will work together for a single member of the court. Larry Thompson, Jr. ('03) was picked to clerk for Justice Clarence Thomas, but deferred for a year. Justice David Souter selected Christine Van Aken ('02).

Beauvais ranked second in his graduating class. Among his many awards, he earned the Frank H. Sommer Memorial Award for outstanding scholarship, character and professional activities. During the 2003-04 term, he clerked for the Honorable Harry T. Edwards of the U.S. Court of Appeals for the District of Columbia Circuit.

A recipient of the University Graduation Prize given to the highest-ranked student, Evangelis received the Judge Rose L. and Herbert Rubin *Law Review* Prize for the most outstanding note written for the *Law Review* in international, commercial or public law. She recently completed a clerkship with Judge Alex Kozinski of the U.S. Court of Appeals for the Ninth Circuit.

Thompson won the Edward Weinfeld Prize for distinguished scholarship

in federal courts, civil procedure and practice. Last year he clerked for the Honorable J. Michael Luttig of the U.S. Court of Appeals for the Fourth Circuit.

Van Aken, a Root-Tilden-Kern Scholar, also won the University Graduation award. During the 2002-03 term, she clerked for the Honorable Pierre N. Leval of the U.S. Court of Appeals for the Second Circuit and was most recently an associate in the New York office of Arnold & Porter. Crediting the Law School for its support, she says, "Because I enjoyed my professors and fellow students so much it made it easier to reach what I thought was my potential." ■

Theano Evangelis, Joel Beauvais and Christine Van Aken are clerking for the highest court in the land this year.



Richard Pildes Wins Carnegie Fellowship

For the second year running, a New York University School of Law professor has been chosen as a Carnegie Scholar by the Carnegie Corporation of New York.

Sudler Family Professor of Constitutional Law Richard H. Pildes was one of 15 professors from across the country to join the 2004 class of Carnegie Scholars. He will receive nearly \$100,000 for his proposed book-

Nelson v. Campbell: Life and Death Litigation

On May 24, 2004, NYU School of Law Professor Bryan Stevenson won a 9-0 victory in the United States Supreme Court, enjoining the execution of David L. Nelson. Stevenson is a renowned specialist in capital defense, and the executive director of the Equal Justice Initiative of Alabama, a private nonprofit organization that provides legal defense for people of color, indigents, and the poor. Stevenson worked on *Nelson v. Campbell* as part of an EJI team that also included two Law School alumni, Marc Shapiro ('03) and Jamila Wideman ('03).

Nelson, who had been on death row for 20 years, did not appeal the death sentence itself, but the proposed method of execution. Due to advanced deterioration of his veins

from intravenous drug use, prison officers proposed a "cut down" procedure in order to administer the state's lethal injection. The method involves deep incisions into either the arm or leg, and the insertion of a catheter. Prison officials refused to assure Nelson that medical rather than correctional personnel would carry out the procedure, or that he would receive adequate anesthesia. Nelson appealed on the grounds that the process constituted cruel and unusual punishment and was therefore in violation of his rights under the Eighth Amendment.

His appeal to the Federal District Court was rejected on grounds that it was a second habeas corpus petition, and as such the court had no jurisdiction to act on the

case. During a further appeal, however, the Court found that since Nelson did not contest the sentence itself, but only the method of execution, his claim was not a habeas corpus petition. Justice O'Connor, who wrote the unanimous decision, supported Nelson's claim for protection under the Eighth Amendment and granted him both a "stay [of execution] and permanent injunctive relief."

Stevenson took the case due to his concern regarding the restrictive approach of the 1996 Anti-Terrorism and Effective Death Penalty Act (AEDPA). "In 1996, Congress barred virtually all litigation by death row prisoners after their initial appeals were complete unless they could present a claim of factual inno-

length study on the influence of democratic politics and constitutional law on the design of democratic structures.

His work, entitled “The Constitutionalization of Democratic Politics,” will contribute to the emerging field of the Law of Democracy, and is intended to reach a wide audience of policymakers, judges, and students of democracy and constitutional law, both in the United States and abroad. Pildes aims to focus attention on whether the regulations of democracy promote political competition, or in fact serve to bolster the grip of existing partisan forces.

This is the first time that the Carnegie Award has gone to the same law school two years in a row. Last year’s recipient, Walter E. Meyer Professor of Law Stephen Holmes, was chosen for his book on Russian legal reform. Both Pildes and Holmes are founding members of the Law School’s Center on Law and Security. Of the 67 scholars who have received this award since 2000, only two besides Holmes and Pildes were law scholars. The Carnegie Scholars Program supports innovative and pathbreaking scholarship on issues related to education, international development, strengthening U.S. democracy and international peace and security.

Pildes is recognized as one of America’s leading scholars in public law and in the legal issues affecting democracy. His work appears in numerous Supreme Court citations and has been translated into several languages—he’s even been nominated for an Emmy Award for his televised legal analysis of the 2000 election. “The Carnegie board looks for the most creative and innovative scholars to nominate,” says Patricia Rosenfield, chair of the Carnegie Scholars Program. “Pildes’ proposal was particularly outstanding.” —Dan Bell

Ending Executions

By Wendy Davis

Call him the international law version of a volunteer firefighter: NYU School of Law professor Philip Alston has a new part-time gig this year: heading off executions before they happen.

As the newly appointed United Nations Commission on Human Rights Special Rapporteur on extrajudicial, summary, or arbitrary executions, Alston will both investigate human rights violations and attempt to head off imminent killings at the pass.

“The objective is to reduce the number of executions taking place,” says Alston, 54, who also serves as faculty director of the Center for Human Rights and Global Justice at the NYU School of Law. “This particular mandate,” he adds, “is very crisis-driven.”

Alston, a native of Melbourne, Australia, was appointed to the three-year Special Rapporteur position by Mike Smith, Chairman of the U.N. Commission on Human Rights. The job, which is unpaid, involves examining and reporting on a broad variety of human rights violations, ranging from genocide to paramilitary executions to deaths of prisoners to so-called honor killings (involving men who kill female relatives for having scandalized their families).

In some situations, the Special Rapporteur also scrutinizes the imposition of the death penalty. For example, the Special Rapporteur has complained about executing defendants for crimes committed as juveniles—which the U.N. considers a human rights offense.



Of course, Alston’s leverage—much like the United Nations’—is limited to political pressure. “The position carries no formal power other than to try to embarrass the government, or to present some international finding that what’s going on is unacceptable,” he says.

Still, he hopes to derail imminent killings. For example, the office frequently learns that someone has been targeted for execution—

perhaps by an unscrupulous business executive—and that the victim’s government intends to turn a blind eye. In these situations, Alston can attempt an intervention, usually by contacting officials from the other country, letting them know that he’s aware of a death threat, and at least tacitly threatening them with embarrassment. Such tactics have prevented executions in the past, says Alston.

Long before this appointment, Alston was well known for his extensive work for international human rights. “He’s an excellent choice,” says Michael Posner, executive director of Human Rights First, a New York-based advocacy group. “He’s been a leading figure in the human rights movement for a long time,” adds Posner, who has known Alston since the 1970s. “He combines academic excellence and scholarship with the real world of activism.”



cence,” said Stevenson. “This left many prisoners who faced cruel or inhumane execution procedures, or people who were incompetent or unjustly sentenced, with no federal remedy. The Nelson case provided some opportunity to challenge the very restrictive approach many federal courts have taken in implementing this provision of AEDPA.”

Stevenson was also disturbed that “Alabama officials were so non-responsive to the serious medical needs of a condemned prisoner who was offering no resistance to his execution, but just wanted basic medical care to avoid what could be torturous pain and brutality.” He hoped that although the judgment “was very narrowly written,” the case might have wider implications for other death row defendants. “The Court has acknowledged that federal courts can’t simply ignore claims of cruel and unconstitutional

conduct just because the plaintiff is a death row prisoner who may soon face execution.”

“I still believe that the civility of a society must be measured by how we treat the poor and disfavored, not the wealthy and the privileged,” Stevenson said. “Consequently, despite the difficulty of the challenge, I’m ultimately energized by advocacy that insists on equal justice, respect for the law and human rights even for the most despised and rejected among us.”

“I believe that the psychic and physical trauma that surrounds any execution of a human being will become a more significant issue in capital litigation and the debate surrounding the death penalty,” he added. “This case will obviously be part of that story.” —D.B.



Figuring Out How Oil Money Slipped Away

Last spring, U.N. Secretary-General Kofi Annan formed a three-person Independent Inquiry Committee to find out what went wrong with a U.N.-run multibillion-dollar aid pipeline to Iraq. The committee is led by former chairman of the Federal Reserve Board, Paul A. Volcker and includes Justice Richard Goldstone, a member of the Law School's global faculty.

The so-called oil-for-food program, operated between 1996 and 2003, was intended to provide vital relief for the Iraqi population, which was being put at risk by the international sanctions imposed against the regime of Saddam Hussein. The core idea was to lift the oil embargo with the condition that revenues be exchanged for food and medical supplies. Unfortunately, there are now accusations that the pipeline had leaks. In fact, preliminary findings by the U.S. General Accounting Office suggest that cash flow was hemorrhaging; charges of corruption have even implicated a senior U.N. official.

Volcker stated three primary objectives for the investigation last summer. "We seek to answer conclusively the allegations of corruption within the U.N. professional staff. We aim to provide...the truly definitive report on the administration of the oil-for-food program. In conjunction with responsible Iraqi and other national authorities, we want to trace corrupt contractors and ill-gotten funds wherever they may be found?"

For Justice Goldstone, it will be the latest in a series of high-profile international investigations. He was a judge of South Africa's Constitutional Court; from 1994 to 1996, Goldstone was chief prosecutor for the International Criminal Tribunals for the former Yugoslavia and Rwanda. He also headed up the International Independent Inquiry on Kosovo between 1999 and 2001. Goldstone is the recipient of numerous human rights awards and has lectured on human rights and South African constitutional issues around the world. —D.B.

Willing to Pack His Bags for the Chance to Learn



The new executive director of the Jean Monnet Center for International and Regional Economic Law & Justice can credit a "nerdy desire to learn about things" for the winding path that led him back to the NYU School of Law,

where he earned his LL.M. in 2002. During four years of practice as an environmental lawyer, Kevin Klingbeil has worked in Johannesburg, New York, Seattle, and Denver.

Environmental law has many tangents, Klingbeil said, including international trade and human rights. Klingbeil has consulted for Maasai tribal landholders and a group representing the interests of the Peruvian Inca culture. He was a representative of East African nongovernmental organizations to the U.N.'s Committee for the International Decade of the World's Indigenous Peoples in 2001-02, and a consultant at the World Summit on Sustainable Development in Johannesburg in 2002. He has also practiced domestically including several years as a consultant and attorney for numerous groups on water, fisheries, natural resources, and land-use law.

At the Jean Monnet Center, he hopes that his experience in South America, Southeast Asia, and Africa will allow him to broaden the Center's scope. It is already the leading North American resource for the study of the European Union and its institutions, policies and legal system. After practically living out of a suitcase for the past four years, Klingbeil is pleased to unpack at NYU. "I've always gone wherever I saw the best opportunities to learn," he said. "Especially in my field, there are few places where I can feel at the hub of intellectual thought. NYU is one of those places."

Chronicling Drought

On a Fulbright scholarship to Brazil in 2000, Nicholas Arons ('04, LL.M. '05) planned to write articles about the effects of drought. He traveled throughout drought-plagued Northeast Brazil and interviewed local residents. Among his adventures, he



made a 150-kilometer pilgrimage to pray for rain, endured a hard-partying adviser who called him "little animal," and, in one extraordinary incident, was kidnapped at an airport.

But when Arons pitched his juicy stories, he was met with rejection; editors said his writing was too scholarly for popular reading and too anecdotal for the journals. So, he decided to write a book. Almost four years after sending out the first proposals, *Waiting for Rain: The Politics and Poetry of Drought in Northeast Brazil* will be published in October 2004 by the University of Arizona Press.

Arons spent his law school years editing his 800-page draft of *Waiting for Rain*. The 250-page book meshes anthropology, history and socio-political analysis to tell the stories of people who have suffered through drought.

Anthropology professor Nancy Scheper-Hughes at the University of California at Berkeley, writes in the foreword: "This book captures the tough spirit of both the region and the author. It tells a story of epic proportions."

Arons, who learned Portuguese at Yale, first went to Brazil as an undergraduate. He immediately took to the laid-back culture

that allowed him to "sit, drink coffee, smoke cigarettes and talk to people" all day.

In 2001, Arons began his legal studies at NYU, where he was a Hays Fellow, president of the NYU American Constitution Society and co-founder of the Indigenous Law Society. His first summer, he interned in Geneva at the United Nations High Commissioner for Refugees. Arons hopes to work in public interest law.

With no publicist, Arons has only modest hopes for the book. He would like to see it in classrooms. "Education should be through stories," he said. "That's what you remember." And, of course, he's hoping to call attention to the plight of people suffering from drought. "Everyone does their little thing," he said. "Hopefully, this will be mine." —W.D.

Using the Law as Leverage to Protect Human Rights



After six years in the trenches of human rights activism, **Margaret Satterthwaite** ('99) recognized the power of the law in human rights issues. She'd been at the forefront of pushing organizations to recognize gay and lesbian

rights, co-founding Amnesty International Members for Lesbian and Gay Reform, now called OUTfront, in 1990. She also was the international programs coordinator for the human rights education organization Street Law. But it was in 1995, as a human rights investigator for the Haitian National Truth and Justice Commission, when the dynamic role of the law in human rights work hit her. "Not only are lawyers taken more seriously by governments, but they also have the ability to articulate protections in an evolving manner, ensuring continual progress," Satterthwaite says. Following law school, she served as a law clerk to Judge Betty Fletcher of the U.S. Court of Appeals for the Ninth Circuit, and to the judges of the International Court of Justice, before consulting at the U.N. Development Fund for Women.

Now, as research director at the Center for Human Rights and Global Justice, Satterthwaite, whose own research focuses on women migrant worker rights, and methodologies for measuring economic and social rights, coordinates the Emerging Human Rights Scholarship conference, a showcase for student research. She also directs the working paper series, which features international scholarship in economic, social and cultural rights, transitional justice, and the right to equality. As a co-teacher of the International Human Rights Clinic, Satterthwaite seeks to turn out lawyers "who are top-notch practitioners with a clear sense of their role in the larger human rights movement."

Continuing a Family Tradition of International Advocacy



When **Smita Narula** goes to a coffee shop near her Furman Hall office, she orders in Punjabi. As the counterman smilingly corrects her, Narula graciously accepts the tutorials. Where others may see the contrast in their stations

in life, Narula, the executive director of the Center for Human Rights and Global Justice, sees two South Asians establishing a connection. "Much of my human rights work has been about eradicating abuse on the basis of caste, religion, gender, or nationality."

Indeed, Narula, whose father retired after 31 years at UNICEF and whose mother currently directs U.N. medical services, has made an international impact investigating religious persecution and caste discrimination. In 2002 as a senior researcher for Human Rights Watch in India, she prepared the only fact-finding report on the massacre of more than 2,000 Muslims in Gujarat. She'd also helped found a campaign for Dalit Human Rights to fight India's "hidden apartheid."

As executive director of the Center, Narula helps organize events such as a conference last March focusing on the intersection of human rights and development. Co-chaired by Faculty Director Philip Alston and Mary Robinson, chair of the Ethical Global Initiative, the session featured World Bank President James Wolfensohn. Narula co-teaches the International Human Rights Clinic that equips students to be human rights lawyers. Last fall these future lawyers assisted Human Rights Watch in locating and interviewing members of the Afghan diaspora about crimes against humanity by leaders who have now returned to power. Through this project, says Narula, students "learned of the never-ending cycle of abuse when people in power are not held accountable."

A Global Background in Policy and Scholarship



Simon Chesterman was in Yugoslavia while pressure was mounting for Slobodan Milosevic to quit office. But his Serbian friends—all educated professionals—were more interested in the U.S. elections and Bill Clinton. "It was 2000, and it made

no sense to the Serbians that the most powerful man in the world would step down from office," Chesterman says. To people living under a dictator, term limits and the democratic process were nearly incomprehensible.

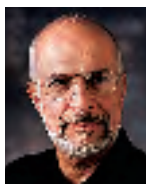
Situations like these raise questions that fascinate Chesterman regarding law and how power is regulated, particularly when countries are in crisis. Besides Yugoslavia, where he worked for the U.N.'s Office for the Coordination of Humanitarian Affairs, he has taken his abiding curiosity to Rwanda, East Timor and Afghanistan, where he conducted research for the International Peace Academy on the role of the U.N. in state-building activities.

Since February, Chesterman has been the executive director of the Institute for International Law and Justice, which brings together the Jean Monnet Center, the Center for Human Rights and Global Justice, and the Program in the History and Theory of International Law. Part of his job, which he neatly encapsulates as "making the whole greater than the sum of its parts," is thumbing through his prodigious rolodex to make things happen.

Chesterman is supervising a new collaboration of international experts called "Making States Work: Governance and Accountability in States at Risk." Their analysis will contribute to debates on U.N. reform prompted, in part, by the war in Iraq. Such projects fulfill Chesterman's hope for the IILJ to "mix scholarly excellence with policy relevance."

—Jeanhee Kim

RTK Endowment Campaign Is a Success



The Law School's Root-Tilden-Kern endowment campaign surpassed its \$30 million fundraising goal, thanks in large part to a matching-gift challenge by

Jerome Kern ('60), at left; a gift from the John Ben Snow Memorial Trust, a longtime supporter; and boosts from Douglas Liebhaftsky ('64) and the Andrew W. Mellon Foundation, whose predecessor, the Avalon Foundation, had given the program its launching gifts in the 1950s.

The campaign topped its target through the support of nearly 470 generous alumni led by Kern, who motivated

them to give more by matching funds with his own additional gift. "Philanthropy is not as simple as writing a check—you've got to work to reach your goals," he said. "When I got involved five years ago, the goal was to raise enough to once again provide 20 full-tuition scholarships like the program did when I was there." Over the past years, funding had dipped and fewer scholarships were awarded. With Kern's encouragement, a majority of RTK alumni donated to the endowment replenishment efforts.

The funding infusion will permit the renowned Root-Tilden-Kern Program to again offer the full complement of annual scholarships. RTK students will join the ranks of over 800 alumni across the nation and the world

who are leaders in public service. "Woven together, your careers make a vibrant tapestry of public service," Deborah Ellis ('82), Assistant Dean for Public Interest Law, told an audience of 350 RTK alumni and their guests at a gala held at the Rainbow Room in April.

Professor Vicki Been ('83), RTK faculty director, lauded the Class of 2004's outstanding merit and achievements, including investigating allocations of humanitarian aid, building housing for the poor, promoting better conditions and wages for laborers, and working to improve the environment. "They haven't just shown a commitment to public service," she said, "they have already made significant marks on the world, in a broad range of public-service activities." ■

Caliphs and the Constitution

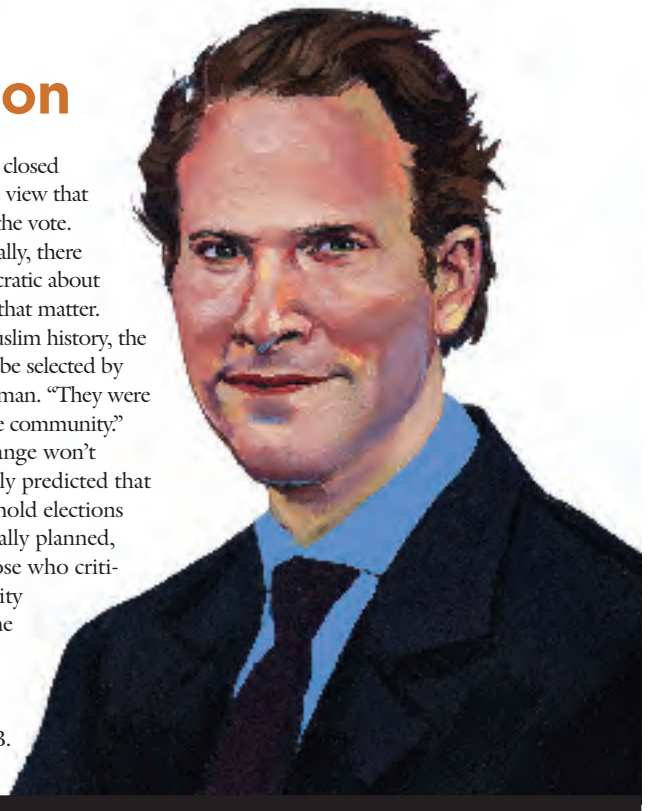
Ever since his appointment as a constitutional law consultant to the Iraq Coalition Provisional Authority last year, New York University School of Law Professor, Noah Feldman, 34, has been much in demand. Profiled in the *New York Times*, the *Jerusalem Report*, and the *Village Voice*, interviewed by the BBC, and often on *Charlie Rose* for late-night tete-a-tetes, Feldman finds himself at the center of a perfect media storm.

As an American Jew who has not only mastered constitutional law, but the tenets of Islam as well, Feldman offers a unique perspective on how to design the Iraqi constitution. He has also gained the trust of those who must implement the new system. Even when he was no longer on the government payroll, members of the former Iraqi governing council continued to seek his advice.

Feldman's first book, *After Jihad: America and the Struggle for Islamic Democracy*, which

was published as the troops closed in on Baghdad, contests the view that Islam is incompatible with the vote. He points out that, historically, there is nothing inherently democratic about Christianity or Judaism for that matter. "From the beginning of Muslim history, the caliphs were understood to be selected by people, not God," says Feldman. "They were expected to consult with the community?"

Yet Feldman knows change won't be easy or swift. He sensibly predicted that it would be impossible to hold elections in Iraq as quickly as originally planned, and was in the ranks of those who criticized the U.S. for lax security during the first weeks of the occupation. As he has frequently been heard to say, "I would rather we do this right than do it fast." —D.B.



© Shawn Barber

Two Professors Hit the Road for Dual Deanships

It is extremely unusual when two leading law schools choose outside deans in a single year and extraordinary if both come from the same institution, but this year the Law School saw two faculty members take deanships, both at California schools. Larry Kramer, Associate Dean for Research and Academics, and the Russell D. Niles Professor of Law became the dean of Stanford Law School this fall. Michael Schill, the Wilf Family Professor of Property Law and Professor of Urban Planning, and the Director of the Furman Center for Real Estate and Urban Policy, became the Dean of the

Law School at the University of California, Los Angeles, in August.

Since he joined the Law School in 1994 from the University of Michigan Law School, Kramer (left) has distinguished himself with first-rate scholarship on constitutional law, including his recent book, *The People Themselves: Popular Constitutionalism and Judicial Review*, published by Oxford University Press. In announcing Kramer's departure, Dean Revesz said, "He has been a terrific teacher and mentor for our students, and has devoted enormous time and energy to improving the quality of our students'

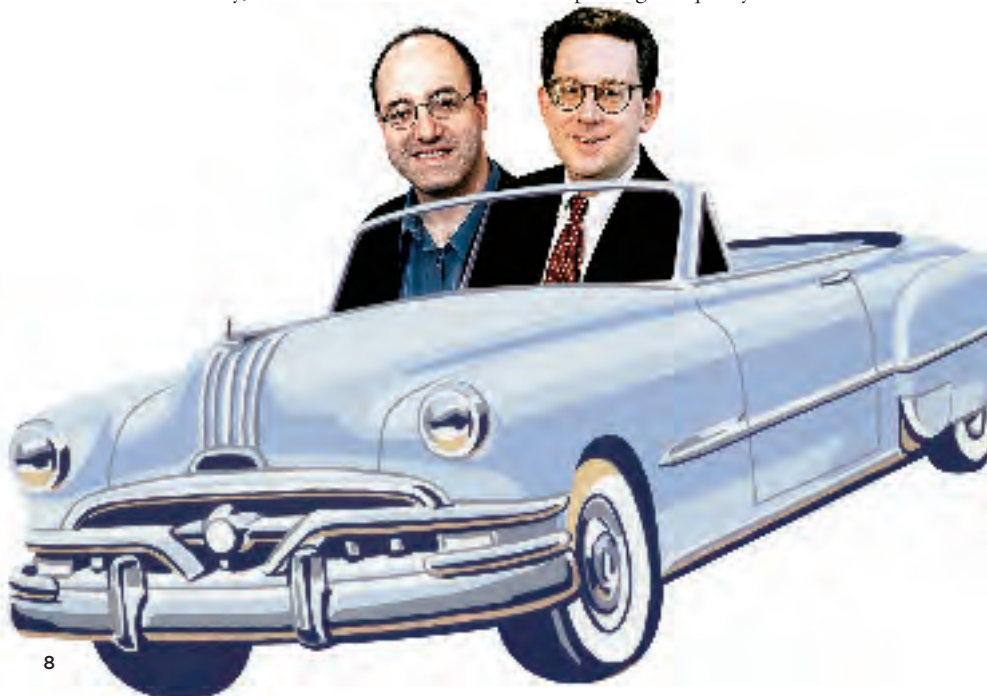
educational experience. He has been essential to—indeed, he was often the architect of—both our efforts to build the best faculty in the nation and our work to ensure that the intellectual life at NYU is unparalleled."

"This is a very special place, much greater than the sum of its parts," said Kramer, who is excited about his move to Stanford but also sad about leaving a place he cherishes.

Schill (right), a nationally recognized expert on American housing law and policy, has written or edited three books and more than 40 articles on various aspects of housing policy, deregulation, finance, and discrimination. He joined the Law School in 1995 from the University of Pennsylvania.

Dean Revesz commented, "Professor Schill has been a leader in building the Law School, launching the Furman Center for Real Estate and Urban Policy, which has produced influential empirical studies of housing policy, and sponsored numerous conferences, panels, and roundtables that have enriched the educational experience of our students and our community."

In his message to the Law School community announcing his departure, Schill said: "I don't think it is an accident that two great law schools chose NYU professors when they were looking for deans this year. NYU is the finest law school in the nation—the special blend of academic excellence, intellectual striving, innovativeness, and engagement in the community is unique among American law schools." —Erik Moga





Update: The Nanny and the Professor

The compelling story of how Barak Bassman ('99), as a first-year law student, persuaded his fellow students and professors to represent his former nanny in a child custody case, was practically made for television. Last spring, *Dateline* NBC finally did a segment, interviewing Bassman and Peggy Cooper Davis, the John S. R. Shad Professor of Lawyering and Ethics.

As a child, Bassman (above left) had learning disabilities and emotional problems that got him kicked out of first grade. His nanny, Louise Brown (right), treated him with prodigious patience and a soothing voice. He credits her with helping him turn from a troubled little boy into a successful adult.

Years later, in 1997, Bassman returned the favor. Brown was involved in a nasty battle to win custody of her two great-nephews, whom she had brought up since they were drug-exposed babies. But before she could adopt them, child welfare caseworkers removed the boys from her care. As their foster mother, she tried to fight, but was told that she had no right to a court-appointed attorney. With no money for a lawyer, an accent that caseworkers deemed a speech defect, and lawyers who argued against her even speaking in court, Brown's case looked hopeless. The litigation would drag on for three years until Brown finally won custody of her nephews. She has also now adopted them.

Professor Davis was galvanized by Brown's plight. "My experience as a family court judge taught me that it often happens that children are removed from their families because an agency has misunderstood the family," she said. "Removals of this kind are very harmful to the children in addition to being very hurtful to the family."

Davis stressed the true moral of the story—that the system is often unfairly skewed against low-income and nonwhite families. "We had a family that was entirely deserving and loving and was harmed by being separated," she said. "It took a little army of law students, members of faculty in the clinic, members of the academic faculty, experts that we obtained, including a psychiatrist, an internal medicine doctor, a linguist...and even with all of that, it took us years to reunite the family." —Jill Filipovic

Joining Forces to Ease Suffering

In an overdue conference, human rights activists and development experts found they share common goals.

Development experts and human rights activists are logical allies, but until recently each tackled issues such as child labor, land rights or women's empowerment in their own way. A deeper connection was formed last spring, however, at a conference entitled "Human Rights and Development: Toward Mutual Reinforcement," co-sponsored by the Law School's Center for Human Rights and Global Justice and the Ethical Globalization Initiative, with support from the World Bank.

World Bank President James Wolfensohn was the keynote speaker; discussions between other World Bank officials and human rights experts such as Mary Robinson, former United Nations High Commissioner for Human Rights and chairwoman of EGL, followed. "There was a time not so long ago when human rights discourse was almost always that of diplomats, lawyers and philosophers, while development thinking and writing was the domain of economists and other social scientists," said Robinson, who also participated in the "Human Rights Perspectives on the Millennium Development Goals," a Law School symposium sponsored by the Center for Human Rights and Global Justice. "Today, that gap is finally closing," she said. "Development practitioners are finding that there are obvious—indeed, elephantine—human rights dimensions to many of the principal themes that occupy their attention."

Wolfensohn also underscored the increasing overlap between development and human rights. "I've said to Mary many times: 'You know, one of the things we have to do in our institution is to try and get things done, but to some of our shareholders the very mention

of...human rights is inflammatory language.' And, it's getting into areas of politics, and it's getting into areas that they're very concerned about. We decide to just go around it and we talk the language of economics and social development."

Wolfensohn went on to outline the difficulties of achieving the Millennium Development Goals—including eradicating extreme poverty and hunger and achieving universal primary education—that all 191 members of the United Nations have pledged to help make happen by 2015. "There's a fair chance that statistically we will achieve the poverty goal," he said. "But if you read the statistics, they are highly biased by China and India. And if you take a look at countries in sub-Saharan Africa you'll find that statistics are, in fact, going in the other direction."

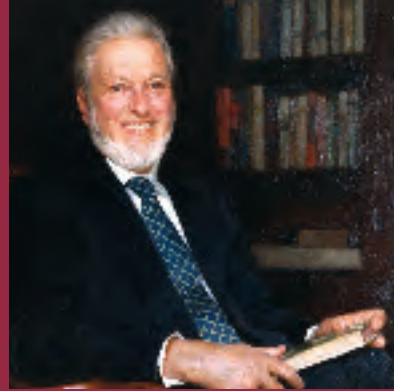
Wolfensohn argued that these goals are difficult to reach because of a lack of focus and financing. "We talk about achieving the objectives because the world is united in support," Wolfensohn said. "It's nonsense. The world's governments are spending 20 times the amount of development expenditures on military expenditures....We [the development community and the human rights community] have a common enemy: indifference. ...By joining together [we can put] pressure on our leaders to make this world a more focused and...effective place in terms of development and in terms of rights."

Last May, just two months after the conference, President Wolfensohn announced that he was putting forth a proposal to the World Bank board to promote a human rights-oriented method in the bank's lending policies. "The institution has up until now refused to deal with its activities using a rights-based approach," he said. ■





Furman Hall



The Architecture of a Law School's Vision

Limos, lights, and a red carpet usually mean one thing: a celebrity-studded movie premiere. But the tuxedo-clad men and well-coiffed women alighting from their cars and heading into Furman Hall, named for Jay Furman ('71), for the NYU School of Law's annual Weinfeld Gala were celebrating a different kind of opening. Law School luminaries and benefactors gathered to dedicate the building itself, the first campus addition since the venerable Vanderbilt Hall was constructed 50 years earlier.

As more than 500 guests sipped champagne and admired spectacular views of the city, one alumna in the crowd, Carol Robles-Roman ('89), the deputy mayor for legal affairs of the City of New York, quietly prepared to make a surprise announcement: Mayor Michael R. Bloomberg had proclaimed that day, January 22, 2004, to be Furman Hall Day in New York City. The mayor wanted to thank NYU President John Sexton and Law School Dean Richard Revesz for, as Robles-Roman put it, "producing the lawyers who make our city tick."

Bloomberg was also implicitly acknowledging the building's symbolic meaning: Furman's groundbreaking took place as scheduled on September 28, 2001, just 17 days after the terrorist attacks on the World Trade Center—the first large-scale construction to begin in the city after that terrible day. “This project affirms our commitment to prepare our students to seek justice through law,” then-Dean Sexton said on that day. “We also reaffirm our University’s resolute commitment to a great city. We build our Law School’s future, as our city must rebuild its future, on a foundation of justice, the bedrock of our republic.” U.S. Supreme Court Justice Sandra Day O’Connor, who attended the ceremony, echoed Sexton’s sentiments. “The need for lawyers does not diminish in times of crisis,” she said. “It only increases. NYU has played, and will continue to play, an important role in training lawyers who understand the need to convince a sometimes-hostile world that our dream of a society that conforms to the rule of law is a dream we all should share.”

A little more than two years later, their ambitious plan was realized, and clusters of alumni and other members of the Law School’s extended family were touring the state-of-the-art classrooms and checking out

the comfortable lounges and clinic offices before heading over to the flower-filled, candle-lit law library in Vanderbilt Hall for the rest of the festivities. The event, by incorporating both sites, was designed to pay homage to the older building’s dedication a half century earlier as well; the new building created a sense of excitement in the reading room, and the grand dame bestowed a bit of gravitas on the upstart across the way. The programs mirrored each other as well. In 1951, the four speakers were: John W. Davis, president of the New York City Bar Association; Roscoe Pound, dean emeritus, Harvard Law School; Sir Francis Raymond Evershed, the Master of the Rolls of England; and Arthur T. Vanderbilt, chief justice of the Supreme Court of New Jersey and dean emeritus of the NYU School of Law. In 2004, the four were: A. Thomas Levin (’67, LL.M. ’68), president of the New York State Bar Association; Elena Kagan, dean of Harvard Law School; the Right Honorable Lord Slynn of Hadley, Law Lord, House of Lords; and Richard Revesz, dean of the NYU School of Law.

Dean Kagan, for her part, underscored her commitment to the psychological cornerstones laid by Roscoe Pound: “Harvard and NYU have followed Pound’s blueprint,” she said. “Go global and keep comparative law at

the center.” Kagan also emphasized the value of Furman Hall’s cutting-edge technology and generous allocation of space for international legal studies. “Never has there been a more important time to create the facilities to allow us to connect with opposite shores,” she said. “As a law school dean, I share your joy in this simply splendid achievement.”

RED BRICKS AND GOLDEN SCISSORS: OPENING THE DOORS

“Ours would be an impressive campus anywhere,” said Dean Revesz at the January 12, 2004, ribbon-cutting ceremony. “It’s wonderful to think we have it right here in Greenwich Village.” Furman Hall, at 245 Sullivan Street, between Washington Square Park South and West Third streets, comprises 170,000 square feet, almost doubling the Law School’s space, while the number of students holds steady at around 1,900. Early on, the Greenwich Village community voiced concerns about the building’s effect on the neighborhood, but the Law School, with the guidance of architectural firm Kohn Pedersen Fox Associates, worked with the community and city preservation groups to



ensure that Furman Hall reflected the history and feel of the neighborhood. The building's facade re-creates aspects of the two structures that previously occupied the site: Judson House, an annex of Judson Memorial Church that was renovated by McKim, Mead & White in 1899, and the Poe House, a row house from the 1830s, occupied briefly by Edgar Allan Poe. Perhaps the most remarkable aspect of the new building is that it was finished on time and under budget. "We are grateful to the members of the Greenwich Village community," said Dean Revesz. "They ended up being our partners."

The dean also expressed gratitude to other key players, including University President John Sexton; Lester Pollack ('57), chair of the Law School's Board of Trustees; Martin Lipton ('55), former chair of the Law School's Board of Trustees and currently the chair of the University's Board; and, of course, Jay Furman ('71), one of the country's leading real estate developers and the building's namesake. "Jay contributed not only generous resources," said Revesz, "but worked tirelessly over several years, with enormous creativity and imagination, to make sure that the project was completed on schedule. Even more to the point, Jay, a devoted alumnus whose generosity has also helped establish our Furman Center for

Real Estate and Urban Policy and the Furman Academic Scholarship Program, personifies a love and commitment to learning. No name could fit more perfectly on this structure than his."

Standing in the bright winter sunlight during the ribbon cutting ceremony on a freezing January morning, Board Chairman Lester Pollack, flanked by festive purple and white balloons, reviewed highlights of the Law School's history—the creation of the Root-Tilden Scholarship Program, the building of Vanderbilt Hall, the formation of the clinical programs—and added Furman's inauguration to the list of big moments. "This building," he concluded, "is an act of transformation."

Then the speakers lifted a pair of enormous golden scissors and snipped the ribbon, officially opening Furman Hall's doors. The group, along with students and faculty, headed inside to scatter crumbs and spill coffee (that is, to have breakfast for the first time in the new building) in the John Sexton Student Forum, a cozy lounge with couches and wooden booths. "Furman Hall is first-rate," pronounced Barry E. Adler, Charles Seligson Professor of Law and associate dean for Information Systems and Technology, as he tried out a booth. "It's as convenient and functional as it is attractive."

WIRED FOR THE RIGHT REASONS: TECH SOLUTIONS

Aside from being an enormously welcoming and well-thought-out space, Furman is also one of the most technically advanced educational facilities in the country. Each of the six classrooms is like a mini-production center where lectures and activities can be recorded, edited, and made available on the Web. Instructors use SMART Sympodiums—basically a kind of touch screen with a computer behind it, allowing teachers to easily incorporate computer and DVD elements into their lectures. The Sympodiums also allow annotating and writing on screen.

All nine seminar rooms have built-in full-coverage miking of both the professors and students, and the four Flexcourts, classrooms with easily changed set-ups that are ideal for various moot court exercises, are equipped with a broadcast-quality video camera, and an on-site control room featuring a production switcher and nonlinear editing system. That means students can simulate a trial, produce a video, and then stream it to the Web. Best of all, the storeroom of old moot court videotapes that could not be accessed efficiently has been replaced by a system where, once captured, the video (and audio)



Opposite page, from top left: Dean Richard Revesz, Lester Pollack ('57), Jay Furman ('71), NYU President John Sexton, Martin Lipton ('55), and former Dean Norman Redlich (LL.M. '55).

Law School Trustees, Justice Stewart Pollock ('57) and William J. Williams ('61).

Furman Hall awaits students to fill its hallways.

Former Dean Norman Redlich (LL.M. '55), NYU President John Sexton, and Dean Richard Revesz.

This page, from top left: The John Sexton Student Forum.

Sandra Coudert ('94) and Gary J. Stadtmauer, MD, enjoy the Furman festivities.

Nicole Deller ('98) and Matthew Bliwise ('98) pose in the new building.

Current students Rajeev Ananda ('05), Anita Girdhari ('05), Menna Tesfatsion ('05), and Candace Brown ('05).

is indexed and saved to a database, from which it can be easily called up and viewed on the Web.

When not in class, students can work and congregate in a multitude of meeting areas, including a study lounge overlooking a garden and several email bars—spots where they can log on and check or send messages. Benches and lounges are liberally scattered throughout the building. The street-level Wachtell, Lipton, Rosen & Katz Student Cafe, named for the prestigious law firm that carries the name of four of the Law School's most distinguished alumni (Herbert Wachtell '54), Martin Lipton '55), Leonard Rosen '54), and the late George A. Katz '54)) looks onto West Third Street through floor-to-ceiling windows. Corridors are intentionally wide so that students can gather between classes, and the building is linked to Vanderbilt Hall through a basement walkway for convenience on cold or rainy days.

"We appreciate the adjustable-height seats in the lecture halls, the amount of space set aside exclusively for students, and the southern exposure in the clinic offices," said Nicholas Kujawa '04), then-president of the Law School's Student Bar Association. "Students clearly were first and foremost in the minds of everyone involved in the creation of Furman Hall."

"I like the new space very much," said Burt Neuborne, John Norton Pomeroy Professor of Law and legal director of the Brennan Center for Justice. "The symposium space on the ninth floor where the faculty meets is the clubhouse I always wanted as a kid—only it's not in a tree. The seminar rooms teach well, and the snack bar serves good coffee."

VANDERBILT'S LEGACY: A MISSION ACCOMPLISHED

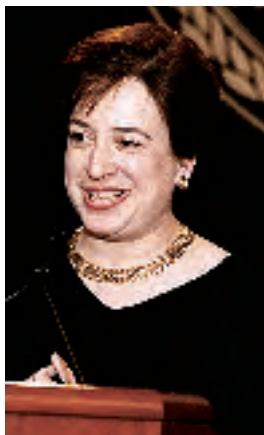
At the Weinfeld dinner, Dean Revesz expressed confidence that Arthur Vanderbilt would have been thrilled by the new building. "Vanderbilt bemoaned the fact that law schools were failing to train students in the various skills essential to the work of a lawyer," Revesz said. The Jacob D. Fuchsberg Clinical Law Center, named after one of the Law School's most distinguished alumni who served for many years on the New York Court of Appeals, occupies two floors, neatly addressing that concern. Students here try (and frequently win) actual cases, write legal briefs, and learn how to deal with unpredictable clients. Furman Hall also houses the Lawyering Program, the intensive mandatory first-year research and writing course,

encompassing interview workshops, negotiation exercises, and other practical assignments.

Vanderbilt also worried about the lack of instruction in international and civil law, said Revesz, pointing out that the [Gustave (LL.M. '37) and Rita ('59)] Hauser Global Law School Program is located on the third floor, and attracts more than a dozen leading faculty members from foreign countries to teach courses and seminars at NYU each year. The program funds 10 of the most outstanding young international lawyers to obtain their LL.M. degrees as Hauser Scholars, while also encouraging collaborations on scholarship between full-time faculty and top scholars from around the world.

"Vanderbilt also would be proud if he visited the Lester Pollack Colloquium Room on the ninth floor," said Revesz, because it addresses that great educator's assertion that the relationship between law and the humanities was not as strong as it should be. "Surrounded on three sides by terraces, the bright and airy space offers an impressive place for flagship intellectual events of legal academia, including the prestigious Law and Philosophy Colloquium."

Finally, Vanderbilt articulated his desire for law schools to address problems of the legal profession itself, Revesz said. Administrative offices—including the Public



From top left:
Jay Furman ('71) receiving the Mayoral Proclamation from Deputy Mayor Carol Robles-Roman ('89).

Alumnae Hall, a 60-seat classroom located on the second floor was funded through the Women's Building Initiative and celebrates the accomplishments of the women who have passed through the Law School. The Hall prominently features portraits of alumnae judges.

The Right Honorable Lord Slynn of Hadley, Law Lord, House of Lords.

Elena Kagan, dean of Harvard Law School.

A. Thomas Levin ('67, LL.M. '68) president of the New York State Bar Association.

Interest Law Center (PILC)—located on the fourth floor, answer that need. “PILC works tirelessly to ensure that our graduates are able to play leading roles in public service,” the dean said. “We led the way in designing an extraordinarily generous Loan Repayment Assistance Program in the mid-1990s and make enormous efforts to fund students who are interested in summer jobs in the public services.” PILC also administers the Root-Tilden-Kern program, launched by Vanderbilt himself, which celebrated its 50th anniversary this year. A newer initiative, the Global Public Service Law Program, brings lawyers from developing countries to the Law School to help them hone the skills necessary to strengthen the rule of law when they return home.

There is no doubt that adding Furman Hall to the NYU School of Law campus is cause for celebration—and that it would have earned Vanderbilt’s robust approval. “We have lofty aspirations to be not only the leading law school, but also the law school that leads in providing social good—with the education, scholarship, and vision needed to improve our nation and the world,” Dean Revesz said during the festivities. “Furman Hall brings us a great deal closer to this ambitious goal. For that, I am deeply grateful.” —Joanna Goddard

A Room of Their Own

A fundraising campaign allowed for the designation of a special place in the new building to recognize women’s contributions both to the Law School and the legal profession. Alumnae Hall commemorates women’s long history with the NYU School of Law, beginning with female scholars who attended in 1892—before women could even vote in the U.S. Alumnae have gone on to become some of the country’s leading judges, practitioners, and government officials. Located on Furman’s second floor, the hall seats 60 students, and features photos of the nearly 50 women judges who are NYU School of Law graduates. Stephanie Abramson (‘69), Kathryn Cassell Chenault (‘80), Marilyn Friedman (‘69), Patricia Martone (‘73), Bonnie Feldman Reiss (‘69), and Kathleen Shea (‘57) led the Alumnae Hall effort.

Naming Names: Designated Spaces in Furman Hall

9th Floor

James H. Fogelson (‘67) Gallery and Seminar Room
Lester Pollack (‘57) Colloquium Room

6th Floor

Gary A. Beller (‘63, LL.M. ‘71) Conference Room
Congressman Frank J. Guarini (‘50, LL.M. ‘55) Moot Court Room
Estate of Stella Malkin Flexible Seminar and Trial Courtroom
Jacob D. Fuchsberg (‘35) Clinical Law Center (spans 2 floors)

5th Floor

Emile Zola Berman (‘24) Conference Room
Jacob D. Fuchsberg (‘35) Clinical Law Center (spans 2 floors)

4th Floor

Adelaide Schnittman Interview Suite

3rd Floor

Hauser Global Law Center
Martin R. Lewis (‘51) Flexible Seminar and Trial Courtroom
Inge and Ira Rennert International Law Suite
Stroock Classroom
Tese Family Flexible Seminar and Trial Courtroom

2nd Floor

Alumnae Hall
Stanley J. Gross Academic Corridor
John Sexton Student Forum

1st Floor

Honorable Frank J. Guarini, Sr. and Caroline L. Guarini Study Lounge
Wachtell, Lipton, Rosen & Katz Student Café
Weil, Gotshal & Manges Seminar Room
Beth and Leonard (LL.M. ‘77) Wilf Main Lobby

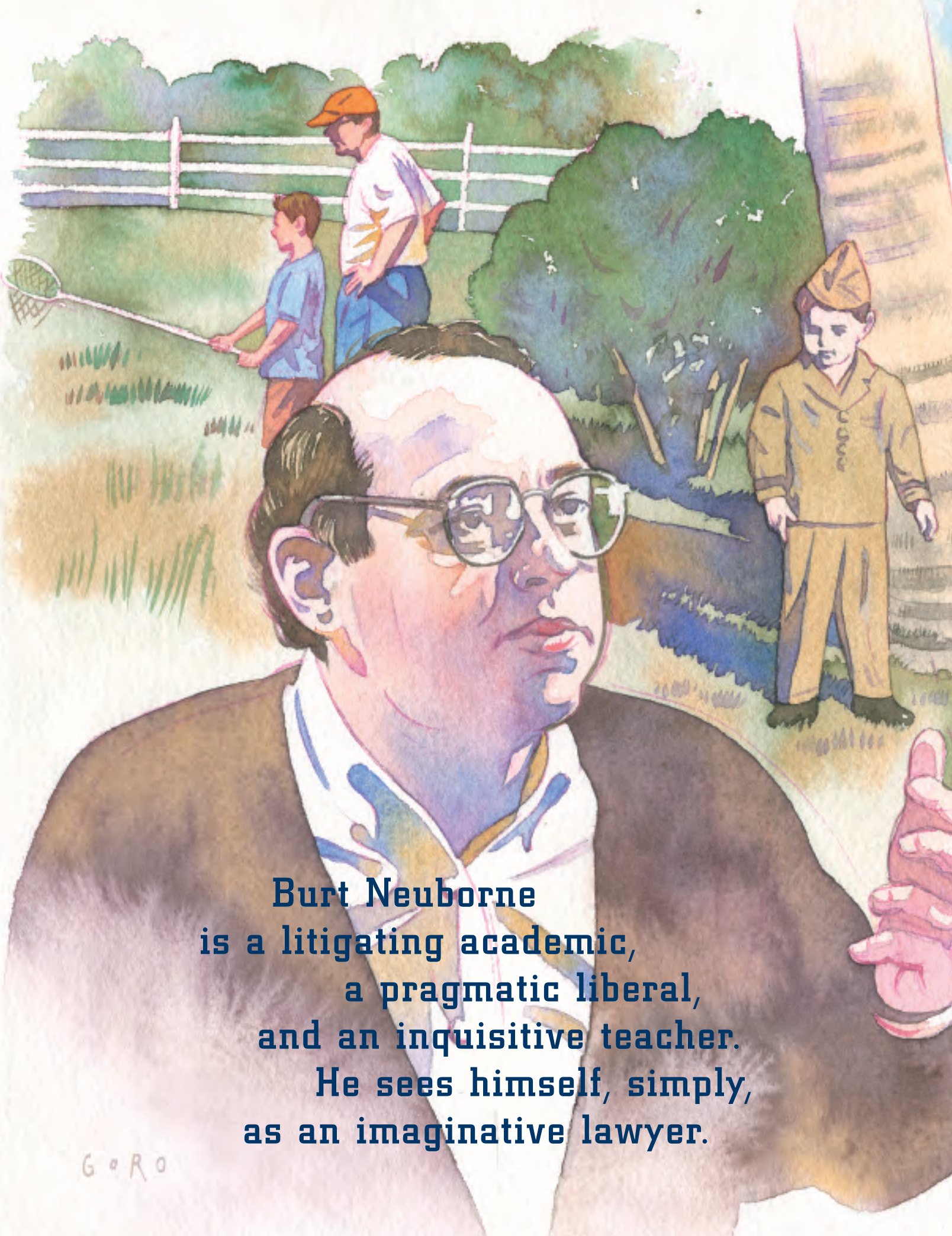
Sullivan Street

Braff Family Garden

C1

Oscar Lasdon Seminar Room
Ira W. DeCamp Foundation Computer Teaching Lab





Burt Neuborne
is a litigating academic,
a pragmatic liberal,
and an inquisitive teacher.
He sees himself, simply,
as an imaginative lawyer.

G. R. O

CREATIVE COUNSEL

BY JOSEPH BERGER

To understand how Burt Neuborne has managed to win so many watershed constitutional cases and harvest billions of dollars for families of Holocaust survivors around the world, all while being a faculty star at the New York University School of Law, it helps to reach back to his days as a gangly youngster on the postwar streets of Jamaica, Queens. As dusk would fall, young Burt would be out playing stickball with the rest of the neighborhood kids and the receding light would make the spaldeen (as the pink Spalding rubber ball was known) hard to pick out. His less relentless buddies were ready to call it a day. Not Neuborne.

“When it would get dark and I was losing, I would always say, ‘We can play another inning,’” he remembers.

Now fast-forward to the Vietnam War era to roughly 1970, when Neuborne, a lawyer for the New York Civil Liberties Union, was defending an artist who had been arrested for sewing a 7 1/2 foot-long American flag into the shape of a penis, stuffing it, and displaying it near the window of

a Madison Avenue gallery. A three-judge criminal court panel convicted the artist of desecrating the flag and a seven-judge New York State Court of Appeals affirmed that ruling. But displaying his legendary doggedness, Neuborne twice took the case all the way to the United States Supreme Court and eventually got a lower court federal judge—the 37th judge to rule on the matter—to declare the flag-desecration statute in violation of the First Amendment’s right of free speech. Exhausted prosecutors called it a day, and Neuborne had won the game in extra innings.

It’s 1973, and this time, in a more momentous case, Neuborne

displayed even more fevered persistence. Now assistant legal director at the American Civil Liberties Union, he was defending American bomber pilots in Thailand who were facing courts-martial for refusing to carpet-bomb Cambodia. To Neuborne’s astonishment, Federal Judge Orrin Judd of the Eastern District in New York upheld his argument—that the pilots could not be punished since Congress had not authorized the war. But the Second Circuit Court of Appeals stayed Judd’s ruling, allowing the bombing to continue. It was summer, so Neuborne could not appeal to the full Supreme Court, and the circuit justice, Thurgood Marshall, despite his anguished personal misgivings, declined to step in. But Neuborne knew that there was at least one more inning he could play.

The ACLU had a “Douglas watch” to keep tabs on the whereabouts of the Court’s most liberal jurist, Justice William O. Douglas, whenever capital punishment and other irreparable-harm cases required emergency stays. Neuborne flew to Washington State, where Douglas was vacationing, and, in a scene evocative of Henry IV’s humbling call at Canossa in 1077, he knocked one morning on the door of Douglas’s rustic cabin in Goose Prairie. Douglas, unfazed, agreed to hear oral arguments in the Yakima post office.

Douglas, as Neuborne recalls it, was frail and tired at the end of his career. “People sort of knew this was his last hurrah.” The canny Douglas found a sly way of warning Neuborne not to be too hopeful, that even his blessing could be futile. “Mr. Neuborne,” the judge asked, “what happened when I was asked to intercede 20 years ago?”

Neuborne remembered that Julius and Ethel Rosenberg had been executed in 1953, for spying, a step taken after the full Supreme Court overruled a Douglas stay. But Douglas’s pessimism didn’t dissuade Neuborne. He anticipated that this time there would not be enough justices lingering in the steamy capital to overrule Douglas.

Douglas indeed ruled in his favor. But the next day the Supreme Court held a conference call to reinstate the stay. Yet it never heard the case on its merits. The Nixon administration, figuring that a Supreme Court hearing might jeopardize its Cambodia policy, simply arranged to have all the pilots honorably discharged. From Neuborne’s point of view, playing after the sun went down paid off once more.

“I verge on the obsessive,” Neuborne said, recalling this episode. “My wife has a wonderful quote from Santayana that she adapted: ‘My husband is a man who redoubles his efforts once he loses sight of his goals.’”

For a man who supposedly loses sight of his goals, Neuborne, 63 years old, has managed to carve out a life that has been elegantly coherent—of pioneering litigation, teaching, and scholarship that has revolved

around a few signature themes like the First Amendment and civil rights. He has argued cases six times before the Supreme Court and briefed some 200 others. His imprint on civil-liberties laws and his ability to analyze the pertinent issues has made him the go-to guy over the years for dozens of journalists and scholars seeking insights on those laws. He shows no signs of slowing down, either. During the last year or so,

Neuborne was a key player in two of the seminal cases of our time.

He helped defend the groundbreaking McCain-Feingold campaign-finance reforms, advising the bill’s sponsors throughout the process—even helping to craft

the legislation. Neuborne also has been deeply immersed in two major Holocaust cases. He is plaintiffs’ counsel in a lawsuit against Swiss banks over their handling of Nazi-era bank accounts and was the principal lawyer in a series of Holocaust suits involving compensation for slave laborers of wartime German industry.

Yet, for the past three decades, the chief institutional anchor of his life has been not an opulent law office but a podium at the New York University School of Law, where he started teaching in 1972 as an adjunct and now has the title of John Norton Pomeroy Professor of Law. There he also serves as the legal director of the Brennan Center for Justice, which was started in 1995 by Supreme Court Justice William J. Brennan’s family with a broad mission of trying to clear the hurdles to a more democratic society. The center’s most notable Supreme Court victories have been its successful defense of the McCain-Feingold campaign-finance reform bill, where Neuborne wrote the brief, and *Velazquez v. Legal Services Corp.*, where Neuborne briefed and argued a landmark First Amendment challenge to the government’s effort to muzzle lawyers for the poor. While juggling these enormously important cases, Neuborne has consistently prepared and inspired NYU School of Law students with his lively Evidence and Procedure lectures.

“Burt has tremendous energy,” said Judge Edward R. Korman of Federal Court in Brooklyn, who decided how to distribute the money in the settlement of the Swiss banks case. “While everything’s going on he sends me law review articles he’s written, he’s speaking in various places, he’s filing papers in this lawsuit, and in the German lawsuit. I asked him a couple of weeks ago if he was on steroids. He’s absolutely brilliant.”

Neuborne has the balding, bespectacled look of a stereotypical scholar, but his face is leavened by the kind of chipmunk cheeks that a mother loves to pinch and the springing steps of a long-distance runner who has completed two marathons (New York and Paris) and still jogs five miles a day on the treadmill. His speech has a slight New York inflection and his voice something of a Mel Brooks rasp, yet he has an impressive Professor Higgins-like gift for well-parsed sentences. Any formality, though, is lightened by a ready smile and a puckish sense of humor.

All of these attributes are evidently arrows in his instructional quiver, qualities that in 1990 won him the University’s Distinguished Teacher award—almost never given to teachers who confront large lecture classes of 100 or more, as he usually does. “I’m an unreconstructed ham,” he said. “That’s why I love being in court, that’s why I love teaching. I love the performance, the standing up in front of a group and performing for them. But I also love the intellectual challenge of it. There’s something splendid about seeing the material each year through the eyes of an idealistic and smart student who asks hard questions about it.”

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It may seem paradoxical, but as a professor Neuborne has generally avoided the topics that have earned him his legal stripes. He spurns courses on the First Amendment or affirmative action or women's rights, topics that as he puts it are "close to my politics." Rather, he teaches workhorse courses in Evidence.

"If I were to teach affirmative action I'd have to be careful not to teach it as a cheerleader," he explains. "If you're going to be a teacher and not a cheerleader you have to force students to confront, to realize there are reasonable arguments that can go the other way and force students to develop those arguments. And I can do it. But it's not something I try to do."

Indeed, when he does teach a rare constitutional law class he will often take a contrarian position by, say, advocating censorship. "I force them to argue me off of the position they know I don't agree with," he said. "The purpose of the classroom is to exercise their minds, not to find out what I think." He has learned, he said, that "the students have absolutely no fear of me and chase me around the classroom."

A visit to a run-of-the-mill Evidence class in March, when students were just back from their spring break, makes palpable Neuborne's zest as a teacher. Neuborne clips a small microphone to his gray V-necked sweater and spends the first 15 minutes of the two-hour class reacquainting students with the differences between statements made assertively and those made more obliquely or through behavior (an opened umbrella declares it's raining, for example). At trial, it's the nonassertive statements that can avoid being classified as hearsay. As he talks, Neuborne's voice rises to a singsong. The students seem riveted.

"He's the best," said Lauren Smith ('04), who shopped around for teachers by auditing classes. "He's very clear and he has a kindness and a sense of humor that comes through in every lecture. He does a good job of mixing the practical and the theoretical, which not all professors do."

NEUBORNE GOES HOLLYWOOD

Despite his numerous careers, the unstoppable Burt Neuborne has managed to find time for one more—Hollywood actor.

He appeared on screen for 10 minutes in Milos Forman's 1996 movie *The People vs. Larry Flynt*, playing Norman Roy Grutman, a New York lawyer representing televangelist Jerry Falwell in his lawsuit against the publisher of the skin magazine *Hustler*. The Academy Award-winning Czech-born film director recruited Neuborne after seeing his work as a Court TV commentator on the O.J. Simpson trial. Neuborne accepted, thinking it would highlight the importance of free speech to a mass audience.

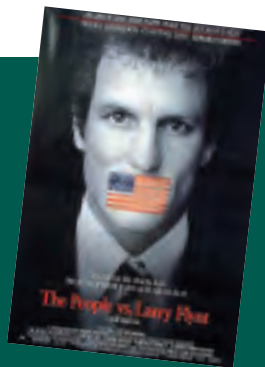
The irony in his casting was that Neuborne, as national legal director for the American Civil Liberties Union, had actually filed an amicus brief to the Supreme Court defending Flynt, not Falwell. Falwell contended that he had been the victim of "intentional infliction of emotional distress" because a *Hustler* parody suggested that he had sex with his mother. Neuborne argued that the *Hustler* article fell within the bounds of legitimate parody of a public figure protected by the watershed *New York Times v. Sullivan* case. While a lower court sided with Falwell, the Supreme Court upheld Flynt's First Amendment rights.

But Neuborne the lawyer's political leanings did not stop Neuborne the actor from being terrier-like in his defense of Falwell. Indeed, he recalls that the script had a courtroom cross-examination that fell flat and Forman allowed him and actor Woody Harrelson to ad lib their exchanges in a more aggressive fashion.

"I was behaving the way I behave in court, pressing Harrelson the way I'd press a reluctant witness," Neuborne said.

At one point, Neuborne complained to Forman that the legal arguments his character was making were rather flimsy, giving the philosophical debate within the movie an imbalance. Forman's tart response was: "You've gotten so Hollywood. All you want is more lines for your character."

"The People vs. Larry Flint" © 1996 Columbia Pictures Industries, Inc. All Rights Reserved. Courtesy of Columbia Pictures.



When you ask Neuborne what he likes about teaching, he quotes John Sexton, who was dean of the Law School between 1988 and 2002 before becoming University president. "Sexton used to say when you became a teacher you were blessed because you entered into cyclical time instead of linear time. Everything starts fresh all the time. Each new year is a new beginning. This is at least the twentieth time I've taught Evidence and the novelty is still there. I learn something new every year."

Neuborne tells of modeling himself on Ruth Bader Ginsburg, who was head of the women's rights project at the ACLU at the same time she was a professor at Columbia Law School, arguing six cases before the Supreme Court that changed the way the law treats gender. "I watched how a superb academic could also be a remarkably effective litigator and actually change things," he said. His teaching, he said, is always enhanced by his work as a lawyer. "I'm a good, strong teacher, but I don't think I could be anything like the force I can be in the classroom if I were teaching just abstractions or my reading of what other people did. The fact that I actually do this stuff is what gives me confidence."

Three or four times a year Neuborne moderates a panel of lawyers and other experts in a role-playing exercise on a controversial issue. In February he ran an Anti-Defamation League-sponsored panel at the Law School on how to handle anti-Semitism on campus. The panel included Tom Gerety, a former president of Amherst who is now the executive director of the Brennan Center, and S. Andrew Schaffer, general counsel of New York University. Neuborne had the panelists pretend they were students, deans, college presidents, journalists, lawyers, and judges handling a mock case where a campus newspaper prints a cartoon of Israeli Prime Minister Ariel Sharon in an SS uniform with a caption: "Stop Israeli Nazi Apartheid."

The mock case raised questions about the parameters of free speech, and as he prowled the stage, Neuborne ratcheted the issue up, probing whether hateful speech can be so extreme that it can incite readers or listeners to violence, discussing differences in speech made on public or private college campuses, asking whether it matters if the offensive newspaper is distributed publicly or on the doorsteps of Jewish students, and considering whether it matters if the president is Jewish or not.

Neuborne certainly doesn't shrink from controversy. The class-action lawsuit against Swiss banks, aside from being astonishingly complicated—some legal papers had to be translated into 16 languages, for example—has also rankled some interested parties. The suit settled for \$1.25 billion, almost \$700 million of which already has been distributed to descendants of bank account holders, inmates of slave-labor camps financed by Swiss banks, refugees who were turned away from Switzerland, and people whose assets were looted by the Nazis and fenced through Swiss banks. A few American survivors or spokesmen like lawyers Thane Rosenbaum and Samuel J. Dubbin have assailed the settlement for giving the bulk of the looted-assets money to survivors in the former Soviet Union and leaving only a small percentage for U.S. survivors. In an interview, Neuborne (who took on this case pro bono) contended



Clockwise from top left:
Neuborne with Melvyn Weiss ('59) and soon-to-be Senator Hillary Clinton; his wife Helen Redleaf Neuborne; teaching at NYU School of Law; inset: as a baby; father, Sam, with Navy frogman unit in WWII; as prosecutor of George III during a mock trial at an ABA meeting in London in 2000; daughter Ellen with her husband, David Landis, and their children, Henry and Leslie, in 2002; late daughter Lauren in front of Sage Chapel at Cornell University where she delivered a sermon at the Alumni Memorial Service in 1996; in Berlin, Germany at the signing of the agreement creating the German foundation "Remembrance, Responsibility, and the Future."



that the needs of elderly American survivors, protected by this country's social safety net, were not as profound as those of 135,000 elderly Soviet survivors, who lack such basics as food, winter fuel, and emergency medical care.

As if that case were not consuming enough, Neuborne also was a principal counsel representing slave laborers owed money by German industry and then became one of two U.S. trustees of the German Foundation, which is now distributing the \$5.2 billion in compensation. Both Holocaust cases involved many flights to and from Europe, and Neuborne admitted in a conversation last February that he was tired and "very rundown."

How does he conduct two or three careers at once—lawyer, teacher, writer? Neuborne self-effacingly credits the help of his Brennan Center research assistants and the computer access arranged for him by NYU through which he can connect to relevant databases anywhere in the world. But he also admits that he permits his work to

occupy much of what, to another human being, would be free time.

"I work all the time," he said. "I cannot remember a weekend I haven't worked a very substantial part of the weekend. When I'm working on a case that I care deeply about it's the closest thing to me to being creative. I would have given anything in my life to be a writer or a painter, but the talent that was given to me was to be an imaginative lawyer—and I put that imagination at the service of issues I care deeply about."

Even when supposedly relaxing at their summer house in the Hamptons, he and Helen Redleaf Neuborne, his wife of 42 years who is now a senior program officer at the Ford Foundation specializing in poverty work, have what they call "study dates." They will sit in the same room with a fire going and take out their laptops. "And we'll be very happy," he said. "We spend four or five hours together, close the computer, go out to dinner and feel terrific."

He has been able to continue working this hard despite open-heart surgery in 2002 and a tragedy that has cast a shadow over his autumnal years. Lauren, one of his two daughters and a rabbinical student at Hebrew Union College, died suddenly in 1996 at the age of 27. She had a heart condition that required a pacemaker and a misfiring brought on a massive heart shock. For months afterward Neuborne walked the streets of Greenwich Village, crying. Friends told him to take the Holocaust cases to find something to animate him again, and it was more than a coincidence that those cases connected him to his daughter's interest in Judaism. "The reason friends urged me to take this was I was in despair, I was just in despair," he said.

Neuborne's older daughter, Ellen, her husband, David Landis, and two children, Henry, 9, and Leslie, 5, moved from Washington to New York to be near him. "That has been a salvation," he said.

The first of four children, Neuborne was born in the Riverdale section of the Bronx on New Year's Day, 1941, an event he likes to view with a dose of wit. "Even then I was a bad tax planner," he said. "I deprived my father of his tax exemption for 1940." His family soon moved to Greenpoint, Brooklyn, and moved again when he was four years old to Queens.

Young Neuborne was close to his maternal grandfather, Louis Danovitch, an immigrant from Odessa, Ukraine, who taught him how to read the stock tables and gave him a taste for intellectual seriousness.

He also gave Neuborne's father, Sam, a tailor, a job managing his sport-clothes factory loft.

Sam, who died five years ago, was clearly the strongest influence in Neuborne's life. He was the kind of principled individual who after the atomic bombing of Hiroshima and Nagasaki returned his war medals to the Pentagon. But he was also a more interesting puzzle, a political leftist who at the same time was a crack swimmer and Navy frogman—an underwater demolition specialist—during World War II. In fact, he had a front-row seat at the D-Day invasion, having been sent into Omaha Beach hours before the actual invasion to blow up the spikes Germans had planted underwater to tear the bottoms out of Allied landing craft. Later, he visited a liberated concentration camp and returned from Europe telling Burt that he would "never set foot on the

continent of Europe again."

During the war, Neuborne's mother, Sylvia, promised that when his father returned he would take Burt to a Major League baseball game. But when the chance came his father

"We can't go to a baseball game because they won't let black people play," Neuborne's father told him. "We don't support that." But Burt remembers fondly that his dad did take him to see a Negro League game between the Homestead Grays and the Cuban X-Giants.

declined. "We can't go to a baseball game because they won't let black people play," he told his son. "We don't support that." But Burt remembers fondly that his father did take him to see a Negro League game between the Homestead Grays and the Cuban X-Giants.

Though his dad believed religion did more harm than good, Burt remembers being bar-mitzvahed in a storefront Conservative synagogue as "an affirmation of the right of Jews to continue to exist." Whatever his political sympathies, he read a wide assortment of writers; some of Neuborne's most indelible memories are of reading Dos Passos, Steinbeck, Hemingway, and Dreiser with his father. Today, Neuborne's taste in books ranges widely, from Gabriel Garcia Marquez to Seamus Heaney to Anthony Trollope. "Till he died there was always a book the two of us were reading together," Neuborne said of his dad. "He also got huge pleasure out of my academic career—when I became a teacher it was a fulfillment of his wish."

His mother, Sylvia, spent her time caring for her home and giving her children a deep sense of affection. "If I had turned out to be a terrorist, my mother would sit on this couch and tell you that terrorism was the right thing to do," Neuborne said.

The feminist era did not deter her from her traditional convictions. Neuborne, whose wife, Helen, was the long-time executive director of the NOW (National Organization for Women) Legal Defense Fund, tells of once growing annoyed at seeing his mother fetching his father's food and cutting it up at a wedding.

"I finally said to him, 'You don't have legs? You can't get up and get your own food?'" Neuborne recalled. "'Helen is going to kill you.'"

His mother shot back: "Shut up. I don't need anybody to tell me I can't get my husband's food." She died at 86 in 2001, and Neuborne thinks that the fact his father died two years before was not irrelevant. "There's a price to having a great marriage," he said. "You're so fused with the other person you can't exist without them."

In his teens, despite the budding concern about the abuse of black civil rights and the excesses of the McCarthy era, Neuborne was not politically active. On Sundays, though, he would take an F-train to Washington Square Park to hear Allen Ginsberg and other Beat poets read at the fountain.

“I thought that was the center of the universe,” he recalled. “There were only two places—Washington Square Park and Paris. There’s a wonderful sense of closure that I really feel. When I was a boy, if you had told me that I would some day do what I do, I would say it is so far out of my reach that it is utterly incomprehensible. I walk through the park every night when I go home.”

His parents had wanted their only son, the first of his family to go to college, to be a doctor, so in 1957 he entered Cornell at age 16 as a pre-med. But by junior year, his mediocre science grades and physical clumsiness made him wonder if medicine was his calling. In a comparative anatomy class, he remembered, he reached for a dead shark specimen in a tank filled with formaldehyde. “I was so nervous and tense about being there that I fell into the formaldehyde. I stank for weeks. No matter what I did I couldn’t get the smell off.” In organic chemistry, he smashed a glass globe and splashed his eyes with sulfuric acid. “I thought, ‘Somebody’s trying to tell me something.’”

He finally told his parents that he couldn’t be a doctor, but that perhaps he would become a lawyer. “My father said, ‘Don’t be a lawyer, you’ll sell insurance for the rest of your life.’ In the Depression, the people he knew who went to law school wound up selling insurance.”

He chose law because it was an intellectual field that allowed you “to live like a gentleman”—comfortably but not lavishly. (He points out that he harbored such notions before “the Rolex years” of the 1980s, when the wave of mergers made lawyers wealthy and changed earning expectations.) He met his wife at Cornell; she was a sophomore and he was a junior who belonged to Tau Epsilon Phi. “We were the squarest pegs in the squarest holes,” he said. “My fraternity was the last fraternity to serenade a sorority.” And, though his contemporaries included fellow New Yorker Andrew Goodman and Cornell classmate Michael Schwerner, who went south to register voters and were slain and buried in Mississippi, Neuborne did not participate in the civil-rights movement in a full-throated way.

Instead, he graduated in February 1961 and joined the Army Reserves, spending seven months at Fort Dix, where he was known as the “college idiot” because he couldn’t take his rifle apart. He then entered Harvard Law School while his wife, who had better grades and spoke three languages, went to work as a secretary to support him. “I loved Harvard,” Neuborne said. “It was a place of great intellectual excitement.”

He then joined a small Wall Street firm, Casey, Lane & Mittendorf, choosing tax work because, he confesses, that was the quickest route to a partnership. It was happenstance that brought him into civil liberties work—a lawyer in his Reserve unit was active in the NYCLU. Neuborne started doing briefs for the NYCLU at night and,

by 1967, he realized he was “intrinsicly out of place” in his day job. “I was uncomfortable spending all my energy defending very privileged people in ways that reinforced their privilege,” Neuborne said. (He took a leave of absence that the firm jokingly extended for 25 years.)

In those days, the NYCLU and ACLU were both located in a building in the Flatiron district honeycombed with left-wing organizations. Aryeh Neier was the NYCLU director. Ira Glasser was associate director. Ruth Bader Ginsburg was a director of the ACLU’s women’s rights project. “By the second day I knew this was what I was going to do,” said Neuborne.

The years between 1967 and 1973, when Neuborne served first as the NYCLU’s staff counsel and then as the ACLU’s assistant legal director, were heady times and Neuborne talks about them with brio. “It was the Vietnam era, the high point of the egalitarian revolutions, and you couldn’t lose. You threw something into court and you won. We used to sketch things out over lunch in the delicatessen. We developed something—I still remember writing it on the napkin—the enclave theory of constitutional justice. What we tried to do was to identify enclaves in American life from which the constitu-

ON-CAMPUS CAMEO:

New ACLU Student Chapter Sponsors Lively Debate

The Law School’s newest student group, a chapter of the American Civil Liberties Union, hosted a debate on campaign-finance reform for its inaugural event this spring. Burt Neuborne, the John Norton Pomeroy Professor of Law and legal director of the Brennan Center for Justice, faced off against long-time friend and colleague Joel Gora, a law professor at Brooklyn Law School and general counsel to the New York Civil Liberties Union.

The topic: campaign-finance reform and the First Amendment. Professor Neuborne, a national leader in the effort to reduce the role of money in politics who helped craft the Supreme Court brief in favor of the McCain-Feingold campaign-finance reform bill, argued that America’s commitment to political equality requires the government to prevent wealth from distorting democracy. He stressed the risks to democracy if nothing is done to limit the power of money to buy political influence. “People think voting doesn’t matter because money talks and they don’t think they can have an impact,” he said. “If we can’t get public funding, we have to have limits... or we’re going to condemn ourselves to a slow erosion of democracy.”

Professor Gora, a ground-breaker in the fight against restrictions on campaign funding (which his organization considers a violation of the First Amendment) argued that America’s commitment to freedom of speech requires the government to stay out of regulating political communication. He stressed the dangers of allowing government to regulate something as crucial as campaign speech. “What is the best way to run our democracy?” Gora asked. “We differ on whether limiting funding is the way to achieve it. Free speech and funding First Amendment rights are not the enemy of democracy—they’re the engine of democracy.”

The debate was heated but good-humored. Gora noted that Neuborne had signed the brief in *Buckley v. Valeo* back in 1976, a case in which the lawyers argued there should be no limit on campaign finance.

Neuborne countered by reminding Gora that one is never too old to reject past errors. The two old friends closed by agreeing to disagree—and to enjoy their exchanges.



tion had been shut out: prisons, schools, mental institutions, the military. The students' rights cases came off of that napkin. The mental commitment cases. All of the cases dealing with free speech in the military."

He is proudest of the cases that challenged the Vietnam War, because for a long time "they were existential cases: they couldn't be won, but they had to be brought." Neuborne also handled school desegregation cases, writing a Supreme Court amicus brief for the integration of the Charlotte-Mecklenburg, North Carolina, school system. There, too, his father's influence made itself felt. Neuborne can never forget how as a 13-year-old in 1954 he traveled with his father on a business trip to Charleston, South Carolina, and there saw black-bordered newspapers announcing the Supreme Court's ruling in *Brown v.*

Board of Education. His father happened to visit a local black minister that night and Neuborne remembers the jubilation.

"You have to look at *Brown* as a symbol," he said. "It sent an enormously important

message around the world that the law was not what Marx said. Marx said that law was a device to keep the weak in place, that the dominant economic class would use law as a club to prevent competition. *Brown* allowed the United States to compete in the Cold War with a different vision of law—that one could actually change the status quo on behalf of the poor and the weak. No one had ever thought about law that way. That set off a legal revolution in this country."

It was in 1972 that he began teaching as an adjunct at NYU, and by 1974 he was asked to teach Evidence full time. The 20-hour workdays of the previous few years—the Vietnam War and civil rights cases and briefs flowing out of Nixon's impeachment—helped spur his decision. So did his wife's graduation in 1974 from Brooklyn Law School. Neuborne hoped that teaching law would allow him more time with his two young daughters while Helen launched her career as a Legal Aid lawyer for poor children. He took another leave of absence. "I didn't tell them about my history of leaves," he said.

Although he returned to the ACLU as national legal director from 1982-86, teaching became the center of his work life and has remained so.

"I love this place," he said. "It has tolerated what is a quirky career. I don't have a traditional academic career in that I don't spend my time in my office writing law review articles. I actually go into court and try to put my ideas into practice. Very few schools would have tolerated that. I would have been told by many of my peers to make a choice."

Neuborne has been fortunate that during his 30 years at NYU, the Law School has been on an upward spiral. The school acquired the pasta-making company C.F. Mueller in 1947, and in the late 1970s sold it for \$115 million, netting a nice portion of the profit, even after the University got its share. The Law School's administration wisely used the money to provide scholarships for top students, reward deserving faculty, improve its tuition subsidies and loan forgiveness program, and build more inviting housing. The fact that New York became a nicer place to live has not hurt. And NYU benefited by being among the very first law schools to be genuinely open to women.

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said. "We mined that vein of enormous talent of women who had missed the boat when it wasn't possible for them to get into law school."

Neuborne is not the reflexive liberal that he may appear to be, nor is he as convinced as he once was of the sweeping power of a legal

decision that squares with his ideology. As a young lawyer, he was champing at the bit to challenge every wrong that came down the pike, but experience has taught him that even a favorable decision doesn't always work out the way one hopes. *Brown*, he said, ended state-supported apartheid in many areas, but it also showed the limits of the law. "You can't say that it successfully led to school integration," he said. We're still a society where by and large people are educated with their own race. It's housing patterns that do it now. So *Brown* was a lesson about what law can't do, the limits of the law."

He also takes some nuanced views on more recent issues. In a conversation last winter just after the Massachusetts Supreme Court said that the state would have to marry gays equally with heterosexuals,

Neuborne did not leap to praise the ruling. "I think I'm getting old," he confided. "I think you must provide some form of relationship for gays that is identical to marriage—in terms of property and any kind

"When five percent of the Harvard class was women, we were making it known in the 1970s that we were happy to have a 50-50 class," Neuborne said.

of legal formulation. Whether you have to call it marriage is a different story. It may be that marriage has a religiously based connotation. Marriage was a sacrament before it was law. And the notion that the law will now turn marriage into something that historically it was not simply to achieve equality strikes me as at least problematic."

Neuborne doesn't look back with regret at not having built a career as a fulltime lawyer. The panel discussion on anti-Semitism drew powerful lawyers from Wall Street and midtown, yet Neuborne seemed completely in his element. "I'm certainly not intimidated," he said. "My career as an academic has also included so much litigation, so much actual lawyering that I move very easily in that world. That's a world where I think people respect me and I respect them. They know I know how to do what they do."

His major regret, he said, is "the unwritten scholarship." He has written perhaps 50 papers, and the piece he is proudest of was one in 1977 about "The Myth of Parity," that business between federal and state courts shouldn't be allocated randomly since each set of courts has certain advantages. But overall, he describes his scholarship as "adequate—I give it a B plus, not in quality, but in quantity."

"For all my talk about being a litigating academic I still believe that the principal and irreducible responsibility of an academic is to produce scholarship," he said. "Our major role is to comment critically on the world in which we live."

"I question whether my litigation victories are more ephemeral than hard thinking would have been, and whether putting my energy into the production of serious thought would have changed things more than winning the lawsuits." Still, such musings don't diminish his retrospective savoring of his career as a law professor. "To be at NYU during the years I've been here," he said, "is like being on a roller coaster that only goes up." ■

JOSEPH BERGER HAS BEEN A REPORTER AT *The New York Times* FOR MORE THAN 20 YEARS. BERGER IS ALSO THE AUTHOR OF *Displaced Persons: Growing Up American After the Holocaust* (SCRIBNER, 2001).

ILLUSTRATION: NEUBORNE FROG-HUNTING WITH HIS GRANDSON, HENRY; AS A CHILD IN UNIFORM DURING WORLD WAR II; WITH BRUCE SEVERY, KURT VONNEGUT, JUDITH RESNIK (?75), AND ALAN LEVINE IN NORTH DAKOTA IN 1975 ON THE EVE OF TRIAL. NEUBORNE REPRESENTED SEVERY, A HIGH SCHOOL TEACHER, WHO HAD BEEN FIRED FOR TEACHING VONNEGUT'S *Welcome to the Monkey House*.





Partners in Crime

By Jodi Balsam ('86)

Illustration by Marilyn Church

If you were to design a criminal law and justice program from scratch, you might go out and hire the author of the foremost criminal law casebook, a top constitutional scholar, a couple of the world's leading sociologists of crime and punishment, renowned former defenders and prosecutors, the chief architect of groundbreaking clinical education programs, an economist and expert on business crime, an authority on international criminal law and national security issues, noted experts on Chinese criminal law, a rising sentencing scholar, and acclaimed public interest lawyers who specialize in representing death-row inmates. Or you could just clone the criminal law faculty of the New York University School of Law.

"We have the strongest criminal law faculty in legal academia," says Professor James Jacobs, the group's de facto chair and director of the NYU School of Law's Center for Research in Crime and Justice. Or the most diverse, interdisciplinary, collegial, or innovative faculty, depending on whom you ask. Whichever adjective you settle on, the NYU School of Law offers an embarrassment of riches to students seeking knowledge and training in criminal law. Whether you are interested in combating terrorism or the latest in rehabilitation, leading scholars can be found at NYU.

Along with the world-class faculty are extraordinarily wide-ranging course offerings, research centers, colloquia, and special programs. Policy-makers and practitioners from all over the world regularly converge on Washington Square South to explore critical issues in crime and punishment. Governments and grant-makers routinely single out the NYU School of Law faculty and alumni for important roles in the administration of criminal justice—both here and abroad. The criminal law program and its scholarship has emerged from, and burnishes, the same legacy that brought the NYU School of Law to national prominence during the past 20 years or so.

Making the Case for NYU



In the past decade, the NYU School of Law has welcomed such leading lights as Stephen Schulhofer, co-author of the leading criminal law casebook; David Garland, who virtually invented the field of the sociology of punishment; Jerome Skolnick, a noted sociologist of policing; Anthony Thompson, founder of the country's first offender reentry clinic; Jennifer Arlen, a 1986 graduate, and one of the few law and economics scholars of corporate wrongdoing; Barry Friedman, an expert in criminal procedure; Kim Taylor-Thompson, a national authority on indigent defense; and Bryan Stevenson, a prominent death penalty litigator. Long-time faculty members like Anthony Amsterdam, Paul Chevigny, Harry First, Martin Guggenheim ('71), Randy Hertz, James Jacobs, Holly Maguigan, David Richards, and Harry Subin are recognized throughout the country as being pre-eminent in their fields as well. Having succeeded in drawing a critical mass of scholars with a central interest in criminal law, the Law School attracts an exceptional group of adjunct faculty. Scholars and practitioners are keen to visit the NYU School of Law and to participate in its lively intellectual community.

It would be difficult to find another law school with such a large criminal law faculty, or a group of professors who are so collegial and interested in one another's work. "We have built a real sense of community among the criminal law and justice group despite diverse politics, methodologies, and interests," Jacobs says. "There is great camaraderie and vibrant exchange." Schulhofer agrees: "The NYU School of Law is home to a variety of academic orientations, offering not just a theoretical approach to the law, but also the perspectives of litigation, empirical research, community service, and intersecting fields like psychology and gender studies. This keeps it stimulating and exciting, especially given the constant opportunities for informal

interaction among faculty at weekly lunches, monthly lectures, and programs put on by the Hauser Global Law School Program, the Brennan Center for Justice, and the Center on Law and Security."

David Garland, the Arthur T. Vanderbilt Professor of Law, who moved with his family from Scotland to join NYU's faculty permanently after several stints as a visitor, finds the Law School's intellectual life intense and energizing: "The Law School is like a small university all to itself. The presence of so many great criminal law scholars and clinicians, and the frequent opportunities for interaction at lunches and colloquia, are a tremendous resource and stimulus." Garland, a professor of both law and sociology, is currently working on a study of capital punishment in U.S. culture. He says he cannot imagine a better place to conduct his research than here, particularly given the presence of colleagues Stevenson, Amsterdam and Hertz, all of whom, says Garland, are legendary figures in the world of death penalty litigation.

As a scholar focused on corporate crime, there were three reasons to come to NYU, says Jennifer Arlen, the Norma Z. Paige Professor of Law: "First, NYU has one of the strongest groups of faculty in three areas important to my work: criminal law, corporate law, and law and economics. Second, being at NYU gives me access to the excellent cadre of visitors—leading people in their fields—who come to NYU. You don't have to track people down; eventually the best people come here. Third, being at NYU helps me to ground my work in the real world by giving me access to very smart people who practice law in New York, many of whom are involved with NYU as adjunct faculty or participate in events organized by NYU's Center for Law and Business." One way Arlen takes advantage of these resources is by caucusing at top law firms such as

Distinguished Criminal Law Faculty



Professor
Jennifer Arlen ('86)



Professor
Rachel Barkow



Professor
Paul G. Chevigny



Professor
Noah Feldman



Professor Harry First



Professor
Barry Friedman

Wachtell, Lipton, Rosen & Katz and Skadden, Arps, Slate, Meagher & Flom, sharing academic ideas with some of the best lawyers who handle the most complex cases and obtaining critical insights into the real-world institutional dynamics and relationships that influence corporate transactions.

For Harry First, the Charles L. Denison Professor of Law, NYU proved itself a top destination when it lured Arlen to join the faculty. “When Jennifer came here from the University of Southern California, the NYU School of Law became one of the few law schools in the country to have two full-time faculty members who teach business crime,” he says. First served as chief of the Antitrust Bureau in the Office of the New York State Attorney General Eliot Spitzer from 1999 to 2001, directing New York’s antitrust enforcement efforts in cases ranging from bid-rigging to Microsoft. He found that the post provided “a welcome opportunity to see how the practice of law keeps changing and to get a realistic sense of how legal disputes are resolved, tried, and settled today.” First’s hands-on experience in antitrust enforcement is a resource that he draws on in his scholarship and classroom teaching. He is revising his business crimes casebook, in collaboration with Arlen, and intends to deal with the complexity of both today’s white-collar criminal activity and the multiple and overlapping responses by state and federal enforcement agencies. “More than anything,” he says, “I hope that the liveliness and currency of classroom discussion and case analysis has been improved by my stint in public service.” He anticipates even greater strength in NYU’s business crime area with the addition this year of Professor Kevin Davis, formerly of the University of Toronto, who was a visiting professor at the Law School last year.

New York City provides broad opportunities for the Law School’s clinicians who consider the criminal law clinical offerings the best in the nation. According to Randy Hertz, professor of clinical law and director of clinical and advocacy programs, there is no place better than New York City to develop innovative clinical programs given the variety of defenders’ offices and community-based organizations and the city’s diverse populations with strong civic involvement. He credits the NYU School of Law with making the most of what New York has to offer: “NYU attracts a solid core of public interest law students and consistently hires the best

clinicians available, allowing for a large program with great opportunities for interaction in and out of the classroom.”

Two of those clinicians are Kim Taylor-Thompson and Anthony Thompson. Taylor-Thompson was teaching at Stanford Law School and Thompson was in private practice when they got the call from former NYU School of Law dean, now NYU president, John Sexton inviting them to think about a move cross country—something they hadn’t been considering. But once they took a look at the department, they were hooked. “We saw that Randy Hertz presented a high-quality program and we could do some growing professionally,” Thompson says. As if to prove that point, both are working on new books, with expected publication dates in 2005.

The newest member of the criminal law faculty, Professor Rachel Barkow, was also attracted by the unusual spirit of innovation and community at the Law School. Following a clerkship with U.S. Supreme Court Justice Antonin Scalia, and then a stint practicing regulatory law at Kellogg, Huber, Hansen, Todd & Evans in Washington, D.C., Barkow chose to begin her teaching career at the NYU School of Law in part because the place pioneered the requirement of

administrative and regulatory law in the first-year curriculum. “I came here because I like working with incredibly smart people who do not rest on their laurels,” Barkow says. “The Law School is full of people who are leaders in their fields yet who are always interested in what a colleague is doing.”

As a teacher of both first-year Administrative Law and

Criminal Law, Barkow sees important connections between the two: “When you get involved in the criminal justice system, you are really interacting with an administrative regime.” Given the list of important criminal justice decisions made outside the courtroom—plea bargains, charging decisions, sentencing guidelines, parole board rulings, among others—Barkow’s scholarship has explored the mechanisms of administrative oversight of law enforcement including through jury nullification and sentencing commissions. As the leading young scholar of sentencing law, Barkow recently testified before the Senate Judiciary Committee on reforming the Federal Sentencing Guidelines in the wake of the Supreme Court’s decision last June in *Blakely v. Washington*, which casts doubt on the guidelines’ constitutionality.

Being at NYU gives me ACCESS to the EXCELLENT cadre of VISITORS—LEADING PEOPLE in their fields—who come to NYU. You DON’T have to TRACK PEOPLE down; eventually the BEST PEOPLE come HERE.

- JENNIFER ARLEN ('86)

The Most Wanted List:

The NYU School of Law's Criminal Law Faculty

Anthony Amsterdam

University Professor

Jennifer Arlen ('86)

Norma Z. Paige
Professor of Law

Rachel E. Barkow

Assistant Professor of Law

Paul G. Chevigny

Joel S. and Anne B.
Ehrenkranz Professor
of Law

Jerome Cohen

Professor of Law

Shamita Das Dasgupta

Adjunct Assistant
Professor of Clinical Law;
Independent consultant
with antiviolenace
women's agencies Praxis
International (MN) and
Manavi (NJ)

Kevin Davis

Professor of Law

Jacqueline Deane ('85)

Adjunct Professor
of Clinical Law;
Delinquency Training
Supervisor for the Legal
Aid Society's Juvenile
Rights Division

Tigran Eldred

Acting Assistant
Professor of Law

Noah Feldman

Associate Professor of
Law; Faculty Co-director,
Center on Law and
Security

Deborah Fins

Adjunct Professor
of Clinical Law;
Director of Research and
Student Services, and
Staff Attorney, NAACP
Legal Defense and
Educational Fund, Inc.

Harry First

Charles L. Denison
Professor of Law;
Director, Trade
Regulation Program

Barry Friedman

Jacob D. Fuchsberg
Professor of Law

David W. Garland

Arthur T. Vanderbilt
Professor of Law;
Professor of Sociology

John Gleeson

Adjunct Professor
of Law; United States
District Judge for the
Eastern District of
New York

Ronald Goldstock

Adjunct Professor
of Law; Advisor,
Secretary of State
of Northern Ireland
Independent Consultant,
Independent Private
Sector Inspector General

David Golove

Professor of Law;
Director, J.D./LL.M.
Program in International
Law; Faculty Co-director,
Center on Law and
Security

Martin

Guggenheim ('71)
Professor of Clinical Law

Sara Gurwitsch

Adjunct Assistant
Professor of Clinical Law;
Deputy Attorney-in-
Charge of the Office of
the Appellate Defender

Randy Hertz

Professor of Clinical Law;
Director, Clinical and
Advocacy Programs

Stephen Holmes

Walter E. Meyer
Professor of Law; Faculty
Co-director, Center on
Law and Security

K. Babe Howell

Acting Assistant
Professor of Law

James B. Jacobs

Chief Justice Warren E.
Burger Professor of
Constitutional Law and
the Courts; Director,
Center for Research
in Crime and Justice

David Klem ('94)

Adjunct Assistant
Professor of Clinical Law;
Senior Appellate
Counsel, Center for
Appellate Litigation

Mei Lin Kwan-Gett

Adjunct Assistant
Professor of Clinical Law;
Deputy Chief, Criminal
Division, U.S. Attorney's
Office for the Southern
District

Eunice Lee ('94)

Adjunct Assistant
Professor of Law;
Supervising Attorney,
Office of the Appellate
Defender

Holly Maguigan

Professor of Clinical Law;
Faculty Co-Director,
Global Public Service
Law Project

Theodor Meron

Charles L. Denison
Professor of Law on
Leave; President,
International Criminal
Tribunal for the former
Yugoslavia

Marshall Miller

Acting Assistant
Professor of Law

Chester L. Mirsky

Professor of Clinical
Law Emeritus

Ronald Noble

Professor of Law
on Leave; Secretary
General, Interpol

Jamie Orenstein ('87)

Adjunct Assistant
Professor of Law;
United States Magistrate
Judge for the Eastern
District of New York

David Patton

Adjunct Assistant
Professor of Clinical Law;
Staff attorney of the
Federal Public Defender
Office for the Southern
District of New York

Richard H. Pildes

Sudler Family Professor
of Constitutional Law;
Faculty Co-director,
Center on Law and
Security

David A.J. Richards

Edwin D. Webb
Professor of Law

Jenny Roberts

Acting Assistant
Professor of Law

S. Andrew Schaffer

Adjunct Professor
of Law; Senior Vice
President and
General Counsel,
University Office
of Legal
Counsel

Stephen Schulhofer

Robert B. McKay
Professor of Law

Jerome H. Skolnick

Affiliated Professor of
Law; Co-director, Center
for Research in Crime
and Justice; Claire
Clements Dean's Chair
Emeritus, University of
California at Berkeley
School of Law

Bryan A. Stevenson

Professor of Clinical Law

Harry I. Subin

Professor of Law
Emeritus

Randy Susskind

Adjunct Assistant
Professor of Clinical Law;
Managing Attorney,
Equal Justice Initiative

**Kim A. Taylor-
Thompson**

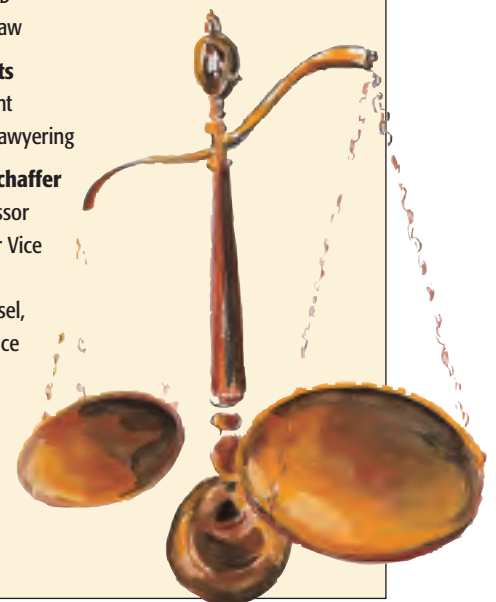
Professor of Clinical Law

Anthony C. Thompson

Professor of Clinical Law

King Yu

Research Scholar





Center for Research in Crime and Justice

The cornerstone of the community at the NYU School of Law is the Center for Research in Crime and Justice (CRCJ). The Center, co-directed by James Jacobs, the Chief Justice Warren E. Burger Professor of Constitutional Law and the Courts, and Jerome Skolnick, the Claire Clements Dean's Chair Emeritus at the University of California at Berkeley School of Law, is the locus of many of the activities of the criminal law group, sponsoring research, hosting events, and making connections among faculty, practitioners, and policy-makers. Every Wednesday during the academic year, faculty are invited to lunch with an important decision-maker or practitioner in the criminal justice system who offers prepared remarks followed by the opportunity for a frank and open exchange of ideas. Recent guests have included Samuel Buell ('92), lead prosecutor in the Arthur Andersen case and special attorney for the U.S. Department of Justice Enron Task Force; New York City Police Commissioner Raymond Kelly (LL.M. '74); Gifford Miller, speaker of the New York City Council; and Margaret Winter, associate director of the American Civil Liberties Union's National Prison Project. Visitors like these go a long way toward serving the Center's principal goal of making the school a regional and national focal point for the study, discussion, and debate of criminal justice policy. Another luncheon guest, Steven Solow ('85), former chief of the U.S. Department of Justice Environmental Crimes Section, says of his visit: "It was a great opportunity to sit around with extraordinarily thoughtful people and talk about the practical and doctrinal implications of the criminal prosecutions I have handled."

The encouragement and connections resulting from everyday interactions among the criminal law group can lead to the unex-

pected. Even when a guest or topic being featured at a criminal law group event "seems furthest removed from your work, it can turn out to be the most interesting and relevant," Harry First remarks. He recalled a guest who made a presentation on the Los Angeles Police Department consent decree, surprisingly raising issues that overlapped with First's work on the Microsoft antitrust case.

The Center's monthly Hoffinger Colloquium on Criminal Justice similarly brings together academic presenters and an audience comprised of a cross section of the criminal justice community to debate and discuss criminal justice issues. With students sitting side by side with luminaries in the field, the colloquium has featured forays into such subjects as terrorism and the policing dynamic, incarceration trends, sentencing guidelines, and domestic violence. The colloquium is named for Jack Hoffinger, the dynamic criminal defense attorney who, for the past 50 years, has been trying cases ranging from white-collar offenses to the sort that generate *New York Post* headlines like "Career Girl Murders" and "Subway-Shove Psycho." Hoffinger took over funding of the colloquium in 2001, having served on the Center's advisory board since the 1980s.

Although not ordinarily referred to as "typical" in any way, Hoffinger is nonetheless typical of the audience for the colloquium—involved, inquiring, and energetic. His distinguished career as one of the most renowned criminal defense lawyers in the nation includes a stint as the president of the New York Criminal Bar Association, and writing and teaching on criminal law issues. Asked why he so avidly supports a law school that is not his alma mater, Hoffinger explains that "The NYU School of Law has the most vibrant and important criminal justice faculty and programs in the country today." When Jacobs was looking for funding to continue the colloquium after the death of its original patron, Alan Fortunoff ('55), Hoffinger did not hesitate:



Professor Jerome Skolnick, right, with Professor Bryan Stevenson, guest speaker at last April's Hoffinger Criminal Justice Colloquium. Stevenson spoke on the topic, "The Politics of Race, Poverty, Culpability, and Harm in American Criminal Justice."

"What the colloquium offers is a fascinating synergy of lecturers who are consistently interesting and provocative, and listeners who are staggeringly knowledgeable and engaged. For the average practitioner, the colloquium might not have practical use today or tomorrow, but you never know when the violin will play. You never know when something you learn at the colloquium will emerge as relevant." He adds, "It's not enough to be lawyers serving our clients. We should be helping make our criminal justice system and our society a better place, and the colloquium is an integral part of that endeavor."

In addition to the Hoffinger Colloquium, the Center sponsors small seminars and workshops frequently to hear from U.S. and foreign criminal justice scholars who are in New York City for a short time, such as Franklin Zimring, the William G. Simon Professor of Law at the University of California at Berkeley School of Law. The Center has also provided a home and an opportunity for scholars to spend extended periods of time at the Law School to further their research efforts and interact with faculty. These visitors have included Professor Dirk van Zyl Smit, former dean of the University of Capetown (South Africa) Law School and University of Frankfurt criminologist Henner Hess.

The CRCJ finds its way into the classroom by luring international scholars to teach specialized seminars to students in the upper years, under the aegis of the Hauser Global Law School

Applying Classroom Concepts to Crime-Fighting

Steven Solow ('85) credits Professors James Jacobs and Harry First with setting him on the path to becoming a prosecutor: "Through both of them, I developed an interest in how government could use its enforcement powers to regulate and change business activities." Solow's career as a prosecutor got off to a quick start because of his experience working with Jacobs and Adjunct Professor Ronald Goldstock on their study of New York City corruption and racketeering in the construction industry for the New York State Organized Crime Task Force. Also formative was his work with Professor Anthony Amsterdam on death penalty matters and in the clinical program. Solow attributes to his clinical training his ability to function as a prosecutor right out of law school: "The clinic taught me to self-educate and to reflect on my own work and learn from experience." Describing Amsterdam's catechism of "plan, do, reflect, integrate," Solow says, "It ingrained in me one of the most valuable tools I have gained from my entire education." — J.B.

Program. Cyrille Fijnaut, the leading scholar of European policing, was, at the time of his visit, a professor of criminal law and criminology at the Catholic University of Leuven in Belgium. Now at the University of Tilburg in the Netherlands, Fijnaut has taught courses on European criminal law and on the comparative history, sociology, and politics of policing in democratic societies. Fijnaut is the author of more than 20 books, including, most recently, *Legal Instruments in the Fight Against International Terrorism: A Transatlantic Dialogue*, a comprehensive volume of international, European, and American legal materials relating to preventing, investigating, and punishing terrorism. He came to the Hauser Global Law School Program as a result of editing, with Jacobs, a book of essays called *Organized Crime and Its Containment: A Transatlantic Initiative*.



Fijnaut is also the founder and editor of *European Journal of Crime, Criminal Law, and Criminal Justice*, a new English language journal in European criminal law, and the general editor of the *International Encyclopedia of Criminal Law*, a series in comparative criminal law. He plans to publish a volume on the criminal laws of every major country.

Renowned Australian political theorist Professor John Braithwaite has been a vital contributor to intellectual exchange among the criminal law faculty. His special interest is business regulation and white-collar crime, and he has focused for more than 20 years on restorative justice and responsive regulatory ideas. Reference to Braithwaite's work is virtually mandatory in any serious discussion of environmental crimes. As an author, co-author, or editor of numerous books and articles, he has contributed significant research to the application of restorative justice principles to business crime as well as to more traditional forms of juvenile and adult crime. Braithwaite's 1989 book *Crime, Shame, and Reintegration* has been highly influential in demonstrating that current criminal justice practice creates shame that is stigmatizing. Restorative justice, on the other hand, seeks to reintegrate the offender by acknowledging the shame of wrongdoing but then offering ways to expiate that shame.

The CRCJ also sponsors ongoing research projects in such areas as organized crime and police accountability and integrity, offering opportunities for students to become involved in the scholarly community. "Students are vital contributors to the Center's work," says Jacobs, whose easy and accessible manner has lured many a student into a career in crime. "I personally have co-authored two

The **STUDENTS** here **GET BETTER EVERY YEAR**, especially in the **CRIMINAL LAW** field, where they **DRAW THEIR INSPIRATION** from the **POWERFUL** triple threat of Stephen **SCHULHOFER**; David **GARLAND**; and James **JACOBS**.

- JEROME SKOLNICK

books and more than a dozen articles with students. It was not a gift to students to involve them in my work. Rather, students have given me a gift with their energies and research efforts."

Jacobs' gratitude to his students is more than matched by their appreciation for the opportunities. "Professor Jacobs and I co-authored an article detailing the role of the congressional hearing in the government's efforts against organized crime," says Elizabeth Mullin ('03), now a staff attorney at the Public Defender Service for the District of Columbia. "Working with Professor Jacobs was an invaluable experience. He was an involved and challenging mentor, whose guidance greatly improved my writing skills." Other Jacobs protégés have similarly built on their collaboration with him, including Ed O'Callaghan ('94), an Assistant U.S. Attorney for the Southern District of New York; Coleen Friel Middleton ('97), an Assistant U.S. Attorney for the District of New Jersey; Robert Radick ('97), an Assistant U.S. Attorney for the Eastern District of New York; and Elizabeth Joh ('00), professor of law at the University of California-Davis Law School.

Former NYC Corrections Chief Argues That Prison Does Not Work

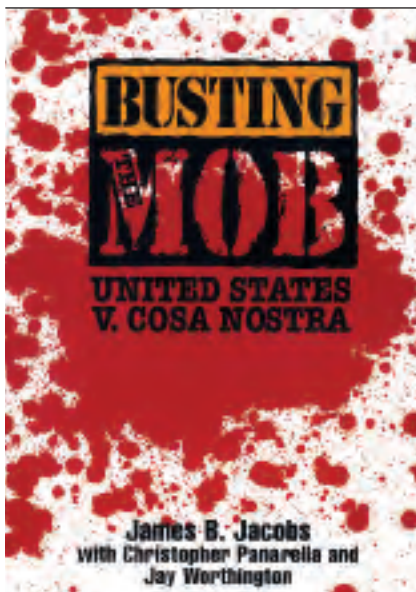


When Arnold Schwarzenegger was elected California's Deficit Terminator, few people anticipated that his tough-on-crime movie persona would translate into deep budget cuts for the state prisons. Except perhaps Michael Jacobson, a professor of criminology at the City University of New York Graduate Center and John Jay College of Criminal Justice. Jacobson has spent the last few years charting social and political developments that are poised to reverse this country's incarceration boom, which accounts for more than two million imprisoned citizens. Speaking at a recent Hoffinger Colloquium, Jacobson drew on his upcoming book *Downsizing Prisons: How to Reduce Crime and End Mass Incarceration* (NYU Press, 2005), to argue that, contrary to popular belief, prison does not work. Jacobson cautions reformers about such structural impediments as public corrections unions interested in protecting jobs and privatized prisons interested in protecting market share. But in his view, the sure sign that U.S. sentencing policy is about to turn a corner came in the 2004 State of the Union address, when President George W. Bush endorsed offender reentry programs as a vital component of crime control: "Rehabilitation, redemption, and reentry are back on the policy drawing board." — J.B.

Skolnick has similarly involved students in his scholarship on racial profiling, the blue code of silence, and coercive interrogation. Skolnick's article "Guns, Drugs, and Profiling: Ways to Target Guns and Minimize Racial Profiling" was written with law student Abigail Caplovitz ('01). "The students here get better every year," Skolnick says, "especially in the criminal law field, where they draw their inspiration from the powerful triple threat of Schulhofer, the leading substantive criminal law scholar of his generation; Garland, the leading criminology theorist in the world; and Jacobs, the leading sociologist of criminal law." He is currently working on an assessment of post-September 11 organizational changes in the NYC Police department.

The Paper Trail

James B. Jacobs' Books and Articles, Co-written with NYU School of Law Students



Gotham Unbound: How NYC Was Liberated From the Grip of Organized Crime. New York University Press, 1999. (Co-authors: Coleen Friel ('97) and Robert Radick ('97))

Busting the Mob: United States v. Cosa Nostra. New York University Press, 1994. (Co-authors: Christopher Panarella ('94) and Jay Worthington ('01))

"Mapping the Gun Culture." *Journal on Firearms & Public Policy* (forthcoming, Fall 2004). (Co-author: Domingo Villaronga ('03))

"Leadership Development and Prison Reform: A Plea for Investment in Human Infrastructure." Symposium issue on prison reform, *Pace Law Review* 24(2) (Spring 2004). (Co-author: Elana Olitsky ('05))

"Ten Years of Court-Supervised Reform: A Chronicle & Assessment." *California Criminal Law Review*, 6(3) (2004). (Co-author: Kristin Stohner ('03))

"The RICO Trusteeships After Twenty Years: A Progress Report." *The Labor Lawyer* 19(3) (Spring 2004). (Co-authors: Eileen Cunningham ('04) and Kim Friday ('04))

"Congress' Role in the Defeat of Organized Crime." *Criminal Law Bulletin* 39(3) (May-June 2003): 269-312. (Co-author: Elizabeth Mullin ('03))

"Labor Racketeering: The Mafia & the Unions." *Crime & Justice: An Annual Review of Research*, 30 (2003): 229-282. (Co-author: Margaret Ellen Peters ('02))

"Extending Brady to Gun Shows and the Secondary Market." *Criminal Law Bulletin*, 37(3) (May/June 2001): 248-262. (Co-author Daniel M. Heumann ('01))

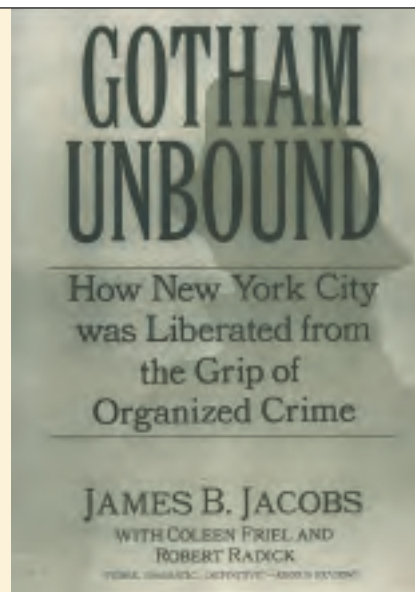
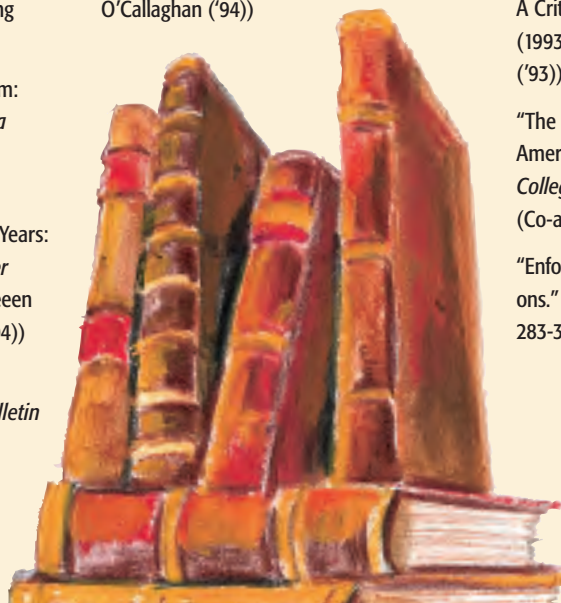
"Cosa Nostra: The Final Chapter?" *Crime & Justice: An Annual Review of Research*, 25 (1999): 129-190. (Co-author: Lauryn Gouldin ('00))

"New York City as an Organized Crime Fighter: The Work of the Trade Waste Commission." *New York Law School Law Review* 42 (1998): 1069-1092. (Co-author: Alex Hortis ('99))

"Organized Crime" in *The Handbook of Crime and Punishment*, Michael Tonry, ed., Oxford University Press, 1998: 159-177. (Co-author: Christopher Panarella ('94))

"Tremors on the Racial Fault Line: The 1996 Black Church Fires in Retrospect." *Criminal Law Bulletin*, 34(6) (November/December 1998): 497-519. (Co-author: Elizabeth Joh ('00))

"Pension Forfeiture: A Problematic Sanction For Public Corruption." *American Criminal Law Review*, 35(1) (1997): 57-92. (Co-authors: Coleen Friel ('97) and Edward O'Callaghan ('94))



"The Drug Testing Society." *European Journal of Crime, Criminal and Criminal Justice*, 4(2) (1996): 120-130. (Co-author: Janet Wieder ('96))

The Social Construction of a Hate Crime Epidemic." *Journal of Criminal Law & Criminology*, 86(2) (1996): 366-391. (Co-author: Jessica Henry ('95))

"The Drug Testing Project in International Sports: Dilemmas in an Expanding Regulatory Regime." *Hastings International & Comparative Law Review*, 18 (Spring 1995): 557-589. (Co-author: Bruce Samuels ('94))

"The Hate Crime Statistics Act of 1990: A Critique." *Criminal Law Bulletin* 29(2) (1993): 99-123. (Co-author: Barry Eisler ('93))

"The Curious Rejection of Drug Testing by America's Schools." *Columbia Teachers College Record*, 94 (Winter 1992): 208-238. (Co-author: Boaz Morag ('92))

"Enforcing the Criminal Law in State Prisons." *Justice Quarterly*, 8 (September 1991): 283-303. (Co-author: David Eichenthal ('88))

Interdisciplinary Perspectives



Another aspect of the scholarship of the criminal law faculty that truly stands out is its interdisciplinary reach. The challenges currently confronting the criminal justice system are not the kind that can be resolved solely by analyzing the latest U.S. Supreme Court slip opinions. The NYU School of Law has long recognized that perspectives from disciplines other than the law are essential to understanding, for example, how to balance civil liberties against national security needs, or questions like: Which policing methods are most effective and how do they measure up in terms of building trust and cooperation in diverse communities? What are the consequences of mass incarceration on crime and on American society? Should failings of corporate governance be resolved by private ordering, civil regulation, or criminal prosecution? How does one mediate between the uses of technology as an instrument of criminality and a crime-fighting tool? What are the ramifications of the increasing privatization of criminal justice? The job of tackling these and other pressing issues requires the participation of scholars from the fields of sociology, criminology, psychology, and economics, and New York University offers a top-flight assortment. A sampling:

Professor David Garland: Exhibit A

Widely considered one of the world's leading sociologists of crime and punishment, Garland joined the NYU faculty from Edinburgh University. His publications on the sociology of punishment, penal policy, and criminological theory can be found on course syllabi from Amherst, Massachusetts, to Adelaide, Australia. He was the founding editor of the interdisciplinary journal *Punishment & Society* and is currently on the board of *The British Journal*

of Sociology and the journal *Law and Social Inquiry*. In addition to his Arthur T. Vanderbilt chair at the Law School, he holds a full professorship in the NYU Department of Sociology.

Over the last academic year, Garland's preeminence in the field was definitively affirmed by three separate academic conferences honoring his work. In September 2003, the Scottish Criminology Conference celebrated the 20th anniversary of the publication of *The Power to Punish*, the seminal book edited and, in part, authored by Garland. As he explains, the book laid out a program for the development of a new sociology of punishment and identified the key issues, ideas, and arguments that have come to define this area. Twenty years later, the conferees assessed what has been accomplished, mounting a retrospective of scholarship in this field, much of which was influenced by Garland's prizewinning studies *Punishment and Modern Society: A Study in Social Theory* (1990) and *Punishment and Welfare: A History of Penal Strategies* (1985).

Later that same month, the University of York's biennial conference on political theory was entirely devoted to a discussion of Garland's tour de force, *The Culture of Control: Crime and Social Order in Contemporary Society* (2001). The book charts important changes in the social response to crime in the United States and Britain over the past 25 years and offers a sociological explanation of how we came to rely on mass imprisonment and a pervasive culture of control to deal with the risks and insecurities that are part of contemporary social organization. In March 2004, there was a third conference honoring Garland's work when 400 delegates met at the Università degli Studi di Milano-Bicocca to mark the publication of an Italian edition of *The Culture of Control*, and to hear several of Italy's leading scholars and jurists discuss its relevance to Italy and other contemporary societies.



Professor David Garland: a sociologist of crime and punishment

The Culture of Control's interpretation of the current scene is grounded in a detailed empirical knowledge of how the criminal justice system works, together with a broad grasp of the social forces shaping everyday life. Because of its broad range and synthesizing vision, the book has resonated in many different countries and in many different fields of scholarship. To date, it has generated more than 60 reviews in scholarly journals, author-meets-critics sessions at several conferences here and abroad, and a forthcoming book—*Politics and the Culture of Control*, edited by Matt Matravers—in which other scholars comment on or take issue with its theses.

Garland is currently studying the American system of capital punishment, showing how its specific form and character have been produced by America's distinctive governmental structures, political history, and cultural conflicts. He seeks to explain why, even though most Western countries abolished the death penalty in the 1960s, the United States continues to execute offenders. Garland rejects the prevailing view that American culture is somehow predisposed toward a punitive response to crime, and argues instead that explanations need to focus upon the specific institutional features of American law and government, and a detailed history of the political and cultural currents that operate through them.

Just as Garland's scholarship is enriched by the dual perspectives of law and sociology, he enjoys interacting in the classroom with both law students and sociology graduate students. "My sociology grad students are training to be academics: they will write dissertations and make careers in the areas that I teach, so they tend to have a deep and long-term engagement with the issues," Garland says. "But it's also exciting to listen to the law students in my seminars on the death penalty, prison law, or sentencing. Many have real, practical experience or detailed policy knowledge in criminal justice. When they bring these perspectives to bear they usually stimulate a terrific classroom dialogue."

Professor James Jacobs: Godfather of the Department

Professor James Jacobs is a prolific and creative legal scholar. Beginning with his 1977 sociology dissertation, *Stateville: The Penitentiary in Mass Society*, which is still the classic monograph on the social and legal transformation of the prison in post-World War II America, through his recent book *Can Gun Control Work?* (Oxford University Press, 2002), which provoked nationwide debate on U.S. gun laws, Jacobs has produced thoughtful work

on an extraordinary range of subjects. In addition to scores of articles, he has written 13 books covering topics like prisoners' rights, civil-military relations, drunk driving, public corruption, organized crime, hate crimes, and gun control. Jacobs describes his work as "driven from the ground up" he says. "I don't come to a subject with a preformed ideological framework. My approach to scholarship is sociological, criminological, empirical, and policy-oriented." Incurably curious and original in his thinking, Jacobs' interests typically take him ahead of scholarship trends.

His book on gun control is a prime example, anticipating the recent flurry of interest in this topic. In researching *Can Gun Control Work?* Jacobs first spent time learning how guns actually operate and who owns and uses guns, concluding that complete disarmament is not a realistic option for the United States. He next looked at the history of gun control in this country, deducing from the statistical evidence that gun control has not made, and is unlikely to make, a noticeable dent in violent crime. Refusing to align himself with any one political perspective, Jacobs examined the various existing and proposed gun controls, refocusing the debate on sensible strategies for reducing gun-related crime. He reached conclusions that annoyed both gun rights' advocates (gun shows are impossible to police and should probably be banned outright), as well as anti-gun activists (a ban on handguns would be just as impossible to enforce as our drug laws).

Jacobs' unapologetic distaste for absolutes and abstractions makes it difficult to pigeonhole his view on any particular issue, with the result that both sides of the political divide have had occasion to blacklist him. When former President Bill Clinton convened a White House conference on hate crime, the U.S. Department of Justice invited Jacobs to attend, but later rescinded the invitation under pressure from activists who did not want the creation of hate-crime categories questioned. Similarly, during the Reagan administration's campaign against drunk driving, the National Institutes of Health were not allowed to cite Jacobs' book on drunk driving because he is not categorically in favor of deterrence and punishment as a strategy. Not surprisingly, Jacobs has never testified before Congress. "I'm not a campaigner or a politician," he says. But people in power pay attention to what he has to say.

Jacobs' latest work focuses on labor racketeering, which in his view "stands at the intersection of two powerful 20th-century institutions—organized crime and organized labor." Jacobs has been revisiting the issue of organized crime since the mid-1980s, fascinated by the strength of its position in the country's economic and political power structure. In writings such as *Busting the Mob*



Professor James Jacobs: an independent thinker

in 1994, and *Gotham Unbound: How New York City was Liberated from the Grip of Organized Crime* in 1999, both published by NYU Press, he has documented and analyzed law enforcement's attack on the Mafia, focusing on the systematic purging of crime families, with hundreds of mobsters sent to prisons and the major crime families in most cities rendered dysfunctional. Jacobs finds it remarkable that so few scholars have shown any interest in this massive legal campaign. "This is not what stimulates most criminal law scholarship in the U.S.," Jacobs says. "Most criminal law academics are more interested in civil liberties issues, are more doctrinally oriented toward what the Supreme Court does."

In turning his attention to mobbed-up unions for his new book, *Organized Crime & Organized Labor*, to be published next year, Jacobs hopes to illuminate the impact of organized crime on the labor movement and on U.S. politics. He is also taking a close look at the Racketeer Influenced and Corrupt Organizations Act (RICO) lawsuits launched against labor racketeering, 19 of which have already resulted in the appointment of trustees to purge the mob and restore democracy in local, regional, national, and international unions. One example is the trusteeship over the Teamsters, the country's largest private union, with 530 union leaders purged since 1989. This litigation crusade "is one of the great episodes of court-ordered reform in the history of American law," Jacobs says, "and no one is writing about it." Nor is anyone eval-

[LAW enforcement's ACTIONS AGAINST the MAFIA] is not what STIMULATES most criminal law scholarship in the U.S.," Jacobs says. "Most criminal law ACADEMICS are more interested in CIVIL LIBERTIES ISSUES, are more DOCTRINALLY ORIENTED toward what the SUPREME COURT does."

— JAMES JACOBS

uating its efficacy, according to Jacobs. After 20 years of a "massive experiment in directed sociopolitical change," he has found that "very little is known about what works and what does not work, or even about what court-appointed trustees in union reform cases actually do."

Jacobs' teaching schedule is no less energetic. He regularly takes the lectern in the first-year criminal law course and the upper-level criminal procedure course as well as teaching Federal Criminal Law and Juvenile Justice courses. He has designed and taught more than a half-dozen different seminars through the years in subjects ranging from sentencing to the drug war. He was recently inducted into the American Society of Criminology, and his seminars reflect his multidisciplinary approach to subjects in criminal law. In a class called *The Regulation of Weaponry* in a Democratic Society, he explores whether gun control is bad for women. In his *Labor Racketeering and Union Democracy* seminar, students read an analysis of corruption and racketeering in the New York City construction trades. "The reason I took a class with Professor Jacobs," says Weston Eguchi ('04), "is that he does not let us make any unchallenged assumptions about a subject." In the

Winter/Spring 2005 semester Professor Jacobs and Adjunct Professor Ronald Goldstock will be launching a new seminar on Privatization in Criminal Justice, dealing with private police, private investigations firms, private prisons, and private dispute settlement (through restorative justice mechanisms).

Professor Jerome Skolnick: A Life of Crime

Professor Jerome Skolnick's seminars on policing and on the regulation of vice also take a nuanced approach, probing the history, sociology, and politics that underlie the law. Although honored for his scholarship by just about every major criminal law and justice organization, Skolnick likes to point out that he is not a lawyer. A native New Yorker, Skolnick's career path has included sojourns writing an award-winning moral philosophy dissertation at the City College of New York and a groundbreaking family law casebook while teaching at Yale Law School, serving in an Army Reserve's South Asia strategic intelligence unit, and winning a National Science Foundation grant to gather materials for his book-length study of the regulation of casino gambling in Nevada. Skolnick spent most of his academic career at the University of California at Berkeley where he was the director of the Center for the Study of Law and Society.



Professor Jerome Skolnick

Skolnick offers a distinctive sociological perspective on criminal law and its administration, befitting the former president of the American Society of Criminology and board member of the American Sociological and Law and Society Associations. He is probably best known for his classic book *Justice Without Trial*, which examines how the subculture of the police influences their enforcement of the criminal law. For the better part of 30 years, Skolnick has been recognized internationally as a premier expert on democratic policing. His theories of police integrity and accountability, most recently developed in his book *Above the Law* with James J. Fyfe (currently the New York City Police Department's Deputy Commissioner for Training) continue to provide a framework that defines the research in this field, most notably in recent examinations of excessive force by police racial profiling practices. "The issue of racial profiling offers an example of how the Law School, and in particular the Center for Research in Crime and Justice, pulls together diverse interests in the criminal justice area to influence scholarship on a subject," Skolnick says. Recollecting his interactions with Thomas Tyler, NYU professor of psychology, at Center events, Skolnick gratefully acknowledges the debt his current work owes to Tyler's seminal studies on what makes a society law-abiding and how practices such as racial profiling undermine police legitimacy and compliance with law.

Skolnick also credits the Law School's new Center on Law and Security for advancing the interdisciplinary approach to issues in criminal law. A regular last year at the Center's colloquia on the legal dimensions of counterterrorism, Skolnick is interested in terrorism as a special type of crime, concentrating police resources into international intelligence, risk prevention, and post-attack planning. "Crime prevention typically involves community relations, targeting high-crime areas, things the police are already doing," Skolnick says. "How does and should this differ when

Distinguished Criminal Law Faculty



Professor
David Golove



Professor Martin
Guggenheim ('71)



Professor
Chester Mirsky



Professor
Richard H. Pildes



Professor
David A.J. Richards



Professor
Harry I. Subin

police are expected to prevent and respond to terrorist acts?” The exchange of ideas stimulated by the Center influenced Skolnick’s recent thinking and research into the role of the law enforcement authorities in national security efforts. Skolnick has recently written two papers on torture and interrogation. “On Controlling Torture” was published last year in a volume edited by Stanley Cohen and Thomas Blomberg. Skolnick’s paper “American Interrogation: From Torture to Trickery” is about to be published in an Oxford University Press book on torture, edited by Sanford Levinson with a forward by Ariel Dorfman.

International Dimensions

Criminal law intersects with many other specialties of law, and many would say this reality is personified in Professor Theodor Meron as he stands at the crossroads of human rights, humanitarian, criminal and international law. A 25-year veteran of



Professor Theodor Meron

the faculty, Meron is currently on leave serving as president of the International Criminal Tribunal for the former Yugoslavia, headquartered at The Hague, Netherlands. This appointment caps off a venerable career in international public service, including his time in the Israeli Foreign Service in the 1970s and, since then, as an active member of the Organization for Security and Cooperation in Europe, the Council on Foreign Relations, and the International Committee of the Red Cross. Along with being a forceful presence on the international stage, Meron has written prolifically on human rights, humanitarian law, and international criminal law.

Having traveled in his life from a Nazi labor camp in Poland to the NYU School of Law, Meron was profiled earlier this year in *The New York Times* as a dedicated scholar who is passionate about the principles of humanitarian law and the quest to avoid the worst excesses of war. (Please see the reprinted article on page 99.) He believes that the Hague tribunal will serve as a model for dispensing international justice for such courts as the International Criminal Court. More important, Meron believes the tribunal marks a growing international acceptance that the world must reckon with war crimes and other massive human rights abuses. As he told the Global Policy Forum earlier this year, “The tribunal serves an essential role in the region itself by showing the victims

of those terrible crimes that, in fact, some of the principal offenders will not go unpunished, that there is accountability, that it really presents an opportunity to put an end, in a some way, to this notion of impunity which has plagued the international community for such a long time.”

Although Meron’s schedule does not permit a full-time teaching load, he continues to supervise student work, including J.S.D. candidates working on dissertations in international criminal law. He also exercises his teaching muscles, delivering the general course on public international law at the Hague Academy this past year, a wide-ranging discourse on the law of war and the criminalization of international humanitarian law, also published in book form as *International Law in the Age of Human Rights*.

The healthy flow of international visitors is also augmented by the Hauser Global Law School Program, which every year sponsors up to 20 leading foreign law professors and judges from around the world to teach at the NYU School of Law, routinely offering a compelling perspective on worldwide administration of criminal justice. The Law School’s preeminence in the field of international criminal law is epitomized by such distinguished visitors as Richard Goldstone, a retired justice of the Constitutional Court of South Africa, which supervised the country’s transition to democracy. Goldstone periodically teaches a seminar at the Law School on the Law of War and International Criminal Courts, which draws on his remarkable career in the enforcement of international humanitarian law. From 1991 to 1994, he served as Chairperson of the South African Commission of Inquiry regarding Public Violence and Intimidation, which came to be known as the Goldstone Commission. Later career milestones have spanned the globe; from 1994-96, Goldstone served as the chief prosecutor of the U.N. International War Crimes Tribunals for the former Yugoslavia and Rwanda; from 1999-2001, he was chairperson of the International Independent Inquiry on Kosovo; and finally, from 2002-03, he served as co-chair of the International Bar Association’s Task Force on International Terrorism.

Current Global Law Faculty member Nicola Lacey, professor of criminal law at the London School of Economics, has taught *Legal Punishment: Philosophy and Practice* during her visits, examining the institution of legal punishment from wide-ranging philosophical and sociological perspectives, with readings in political theorists such as Jeremy Bentham, H.L.A. Hart, Michel Foucault, and John Braithwaite, who himself was a visiting professor at the Law School in 2001. Lacey’s interdisciplinary scholarship draws on several fields—criminal law doctrine, criminology and criminal justice studies, feminist theory, and political philosophy—all of which she applied to research on moral blaming and judgments of guilt in criminal law, con-

The **HAUSER GLOBAL LAW SCHOOL PROGRAM** hosts a steady stream of events and sponsors numerous **PROJECTS AND INITIATIVES**, many bearing on issues in international criminal law such as the **PROJECT ON TRANSITIONAL JUSTICE**, directed by Professor **ALEXANDER BORAINÉ**, former vice chair of **SOUTH AFRICA'S** Truth and Reconciliation Commission.

Given the impact of a nation's criminal justice system on foreign relations, many of the foreign students who study at the Law School every year, including the specially selected Hauser Global Law Scholars and the Global Public Service Law Scholars, are engaged in serious scholar-

ship in criminal law topics. They are drawn to the NYU School of Law to exchange ideas and have their work reviewed by the faculty equivalent of a world-class editorial board. Millie Odhiambo ('01), a former state attorney for Kenya, grabbed this opportunity when she came to NYU to study international human rights law and comparative criminal law. Working with Holly Maguigan, professor of clinical law and a faculty director of the Global Public Service Law Project, Odhiambo engaged in a case study on using public interest law to vindicate women's rights in Kenya in the area of domestic violence. As a result, Odhiambo was awarded a Global Public Service Fellowship to work with the Children's Legal Aid Network in Nairobi, where she developed a family and juvenile court manual for indigent clients and wrote "best practices" guidelines to assist legal aid clinics addressing family law issues.

The Hauser Global Law School Program also hosts a steady stream of events and sponsors numerous projects and initiatives, many bearing on issues in international criminal law such as the Project on Transitional Justice, directed by Professor Alexander Borainé, former vice chair of South Africa's Truth and Reconciliation Commission. Borainé's project is the first systematic effort to combine intellectual and practical approaches to the new field of "transitional justice," which studies how countries are moving from authoritarian rule to democracy.

The Law School's full-time faculty also boasts Professor Jerome Cohen, an expert in East Asian studies, international business transactions, comparative law, and international law. At Harvard University and, since 1991, at NYU, Cohen helped pioneer the introduction of East Asian legal systems and perspectives into the United States' legal curricula. Considered the leading American scholar of Chinese law, Cohen, assisted by Taiwan-born legal scholar Ping Yu, teaches a course on Chinese law and society that is consistently overbooked.

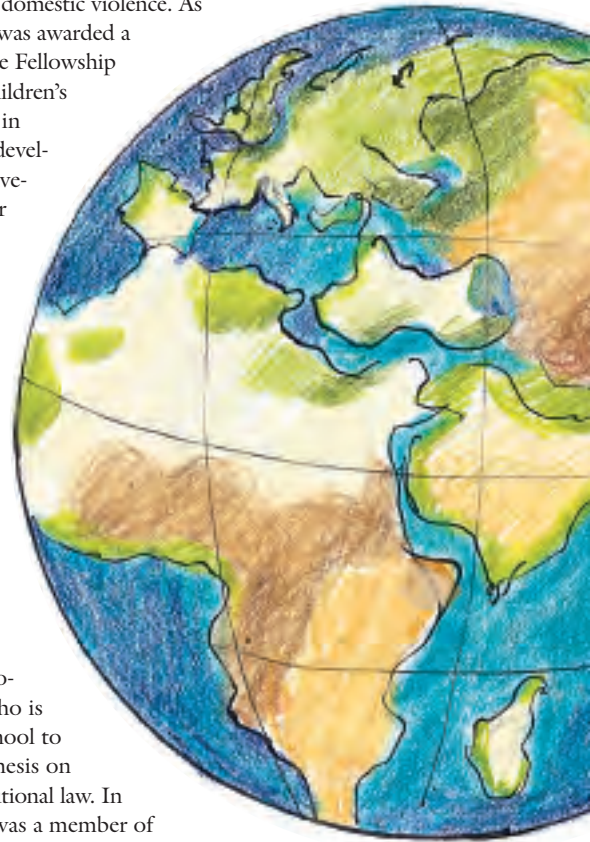
The international reverberations of the NYU School of Law's criminal law program are epitomized by Arun Thiruvengadam (LL.M. '02, J.S.D. '05), a law professor from India who is visiting the Law School to write his doctoral thesis on comparative constitutional law. In the early 1990s, he was a member of the third graduating class of the National Law School of India University, studying at a time of tremendous intellectual excitement about the law in India. After practicing and teaching law in India and working on significant public interest litigation there, Thiruvengadam says he had grown skeptical of the judiciary and courts as mechanisms for bringing about social change in India. He decided that he needed to expand his thinking about the law in a program with a strong comparative law focus. At the NYU School of Law, he says, "I experienced excitement about the law again." After completing a one-year LL.M. degree, he was awarded a Global Public Service Law Scholarship to pursue his J.S.D. "I was convinced to continue my studies by the level of academic inquiry at NYU and the opportunities to interact with scholars from all over the world."

In addition to his many efforts to assist in the successful integration of China's burgeoning economy into international markets, Cohen is increasingly involved in criminal defense work. In cases that could be seen as the inevitable result of the clash between China's new openness and its powerful and corrupt bureaucracies, Cohen has found himself serving as counsel in a number of high-profile cases involving China's illegal detention of American-based Chinese scholars and U.S. businessmen of Chinese ethnic descent.

The enormous difficulties facing criminal defense lawyers in China have become a recurring theme in Cohen's public lectures. This focus on China's criminal justice system is just the latest twist in his career-long exploration of the extent to which China's traditional legal culture presents an obstacle to modernization. In the last year, he has addressed university audiences in Hong Kong on China's use of the death penalty, in Shanghai on Chinese perspectives on corporate fraud and governance, and in Beijing on U.S. criminal law. Accompanied on these visits by Law School reinforcements, including Professors Jacobs, Skolnick, and Stevenson, Cohen hopes to establish an ongoing dialogue with their Chinese counterparts in criminal law and criminal procedure.



Professor Jerome Cohen



For Thiruvengadam, his semester in the Comparative Criminal Justice Clinic was a turning point. He won an award for his work at the clinic, which primarily involved helping represent an undocumented alien who seriously injured her boyfriend in alleged self-defense, fled to Jamaica after the attack, and was ultimately extradited back to the United States to stand trial. Thiruvengadam's efforts on her behalf included substantive research into the law of extradition, mental competency, and the admissibility of foreign confessions, as well as participation in pretrial criminal law practice ranging from factual investigation to hearings on discovery and evidentiary matters. His experiences in the clinic, and his sense of the Law School's overall commitment to public service, gave him focus for his eventual return to the legal academy in India. "I hope to found a public interest law center in India, modeled on the one at NYU, to provide the training, counseling, job opportunities, and financial support necessary to develop career paths in public interest law," he says.

U.S. students interested in international criminal law similarly have access to transformative learning experiences, including positions as interns at the U.N. International Law Commission or as judicial assistants at the International Court of Justice at The Hague. The Law School has also sponsored students for clerkships with the Court of Justice of the European Communities in Luxembourg, the Constitutional Court of South Africa, and the Interamerican Court of Human Rights. These clerkships with foreign and international courts, which are constantly being expanded, reflect the Law School's determination to broaden the global opportunities available to students interested in criminal law.

Center on Law and Security

Since September 11, 2001, constitutional democracy in the United States has had to confront legal issues regarding national security and policing that present completely novel questions. The expertise that exists on these issues is overwhelmingly concentrated in New York City. The NYU School of Law's Center on Law and Security, funded by a grant from the U.S. Department of Justice, is a research and policy program that fulfills a dire need for information, scholarship, policy advice, and debate on counter-terrorism and peace-keeping, the

critical legal areas of our times. Richard Pildes, the Sudler Family Professor of Constitutional Law, a Center faculty co-director and a specialist in legal issues affecting democracy, sees the Center as an example of how scholarship at the NYU School of Law is concerned with practical relevance. The challenge of the age of terror for legal scholars, Pildes says, is "to take the structures, principles, and values developed in other contexts and make sense of them in this new context."

"We serve as an educational and informational resource for anyone interested in the legal dimensions of counterterrorism," says Karen Greenberg, the Center's executive director. "We have interacted with the Homeland Security Department, the CIA, the NYPD, Scotland Yard, many of President Clinton's former advisers, the staffs of numerous Congressmen and Senators, the RAND Corporation, the Manhattan Institute, and the Brookings Institution, to name a few." These exchanges often take place in open forums where the well-informed participants—decision-makers themselves—examine the current legal debate over counterterrorism. Examples from the Fall semester include *Guantánamo: The Supreme Court Cases and the Extent of U.S. Power Over "Illegal Combatants"—What Will It Mean?*, *The USA Patriot Act: Where Do We Go From Here?* and *Al Jazeera: Propaganda or Investigative Journalism?* The Center even hosted an advance screening of the controversial documentary *Uncovered: The Whole Truth About the Iraq War*. The Center also collaborates with organizations and agencies engaged in the war on terror, including working with the NYPD's counterterrorism personnel, to contribute fresh thinking on how to moderate law enforcement reaction in crisis situations.

Professor Stephen Holmes's work also pushes the boundaries as he explores the hot new field of national security law, in particular its connection to international relations and the enforcement of international criminal law. With degrees in philosophy and political science, Holmes is a specialist on the history of European liberalism and on legal change in Eastern Europe and Russia after communism. His latest work focuses on the evaluation of efforts by institutions, such as the World Bank, to promote the "rule of law" in transitional and developing countries, and on the global implications of antiterrorism measures. As a faculty co-director of the Center on Law and Security, he brings his legal and historical acumen to scholarship involving the apprehension and punishment of terrorists. This

year, his students will get a taste of this interdisciplinary framework in his Political Trials: Dilemmas of International Criminal Law seminar.

The Center on Law and Security's main initiative since its creation in 2003 has been the Program on Law and Security, led by the Center's four co-directors—Professors Noah Feldman (author of *After Jihad: America and the Struggle for Islamic Democracy*), David Golove, Stephen Holmes, and Richard Pildes. The Center convenes policy-makers, law enforcement officials, and scholars who discuss and make recommendations on security issues, including the rules and regulations of information sharing among agencies; the role of international organizations in rebuilding Iraq; democracy and Islam; preparedness in New York City and other urban areas nationwide



Former Deputy Attorney General and Brookings Institute Senior Fellow Larry Thompson speaks at the "Are We Safer?" conference as Lee Wolosky, former Director for Transnational Threats at the National Security Council, looks on.

and abroad; international codes for apprehension and punishment of terrorists; and secrecy in government and the media. As might be expected, criminal justice themes reverberate throughout the Programs' efforts, which include study of the legal framework for investigating terrorism, law enforcement methods at home and overseas, the challenge posed by international collaboration in the prosecution of terrorists, and constructing a security apparatus for new democracies. As evidence of the Center's relevance, it is worth mentioning that last year Holmes, and this year Pildes, were selected for the prestigious Carnegie Scholar grant—the first time a law school's faculty has been chosen two years in a row.

To carry out the Program on Law and Security, the Center has embarked on an ambitious project called the Colloquium on Law and Security, which gathers law students, faculty members, and interested guests on a weekly basis to delve into the issues and current state of the debate over specific topics in counterterrorism. Last fall, the colloquium was run by Professors Holmes and Pildes. Guest speakers have included noted Middle East scholar Rohan Gunaratna on Al Qaeda's global network of terror; Daniel Benjamin, senior fellow in the International Security Program at the Center for Strategic and International Studies on the current war on terror; Jack Goldsmith, then the Assistant U.S. Attorney General for the Office of Legal Counsel, who is an expert on U.S.

Constitutional Scholars Debate Guantánamo Bay Detentions

In a world where the traditional rules of war became obsolete on September 11, 2001, how should a country founded on the rule of law deal with captured foreign nationals? The Center on Law and Security at the NYU School of Law hosted renowned constitutional law scholars to

debate whether and how U.S. courts should assess the procedural rights of suspected Al Qaeda members detained at a Navy base in Guantánamo Bay, Cuba.

At the time of the February 2004 debate, more than two years of incommunicado captivity had elapsed for the 600-plus detainees held in Cuba. The U.S. executive branch and military assert that the detainees are "unlawful combatants" under international law, who may be held indefinitely with only the minimal procedural protections afforded by military tribunals. Lawyers for two groups of detainees are attempting to challenge their detention before a U.S. civilian court. (In June, the Supreme Court rejected the government's claim that it can hold "enemy combatants" without giving them a day in court.)

For a case that appeared to reside at the crossroads of personal liberty and national security, the legal issue at the heart of the Guantánamo Bay proceedings sounded rather technical: Did the United States in fact have jurisdiction over the Navy base, which it has leased from Cuba for more than 100 years? Lower courts had ruled that Cuba, and not



The Center on Law and Security's open forum on Guantánamo Bay brought together a panel of experts to discuss the implications of Supreme Court cases and the extent of U.S. power over 'unlawful combatants'.

the United States, had sovereignty over the base and U.S. courts cannot assert jurisdiction over the detainee's claims.

The NYU School of Law's Professor Rachel E. Barkow warned against deploying formalistic arguments in resolving the detainees' claims. Having read the wide-ranging amicus briefs filed in the Guantánamo Bay cases, Barkow concluded that the U.S. Supreme Court's own legitimacy and the credibility of U.S. rule of law was at stake. She cited a brief filed by members of the British Parliament, which urged the Supreme Court to consider how a ruling denying judicial access would appear to the rest of the world. A consortium of international diplomats echoed this plea in an amicus brief declaring that dismissal of the detainees' claims on narrow jurisdictional grounds would sabotage diplomatic efforts.

Professor David Golove, a faculty co-director of the Center, described two models for dealing with detained foreign nationals—peacetime and wartime—and characterized the Bush administration as "extremely aggressive" in adopting a wartime posture. Golove contrasts the current war on terror

with "total war" situations of the American Civil War and World War II, during which much of current U.S. jurisprudence on military detention was developed. Courts should reject a wartime model for the Guantánamo cases, he argued, because of the likelihood of bystanders

being mistaken for belligerents, the indefinite duration of the war on terror, and the unclear nationalities of terrorists whose actions do not necessarily implicate their country of citizenship.

Ruth Wedgwood, professor of international law and diplomacy at the John Hopkins School of Advanced International Studies, countered that the September 11 attacks were recognized by NATO, the United Nations, and Congress as acts of war, and that Congress authorized the use of force against the Taliban and Al Qaeda. Wedgwood insisted the U.S. military provided due process when it whittled the original 10,000 Al Qaeda captives down to 600. Nothing in international law subjects this process to further appeal, she asserted, adding that "you can't have Article III judges roaming the battlefield."

The panel took place during a week when aides discovered poisonous ricin powder in the offices of the U.S. Senate majority leader and terrorists bombed a Moscow subway—proving the event to be a timely and essential exploration of the proper legal response to 21st-century methods of war. — J.B.

civil litigation and international terrorism; and William Wechsler, former director for transnational threats at the National Security Council, on cutting off terror financing. With required readings posted on the Center's Web site, the colloquium brims with dialogue and debate. This intellectual exchange is at the core of the Center's mission of facilitating discussion across borders, professions, and perspectives as to how to fight the war on terror. "As we implement our program," Pildes says, "I can see the Center making special policy recommendations or assisting in designing new institutional structures such as special terrorism courts."

In addition, the Center hosts two major conferences each year. The one held in November 2003, "Are We Safer? Transformations in Security After September 11,"



Professor Stephen Holmes

discussed how to resolve the tension between civil liberties and the need to gird our national security. The other, held in June 2004, gathered antiterrorism experts for two days of intense talk at NYU's La Pietra campus in Florence. (Please see full story on page 57.)

What Karen Greenberg, the Center's executive director, has been gratified to learn is that no side of the debate on antiterrorism has a monopoly on respect for the law. Despite how the media reports on the Patriot Act, Greenberg believes that

"law enforcement officials, including in the Bush administration, are hesitant to bend the law to accommodate hysteria about terrorism. They have respect for the law and for their profession and are struggling with these issues as much as anyone."

The Center also sponsors research and scholarship in counterterrorism topics, such as Golove's and Holmes' article on terrorism and accountability, published in the Center's quarterly review. Holmes has also been widely published in journals such as *The Nation*, *The London Review of Books*, and the website Salon.com. Rarely has serious legal scholarship so quickly been converted into meaningful policy discussion.

The same could be said of Pildes' work on the processes of democratic discussion and decision-making within the three



Rohan Gunaratna, flanked by Professors Richard Pildes (left) and Stephen Holmes, at the Center on Law and Security's Fall 2003 Colloquium.

branches of government as they each struggle to delimit and deploy the tools of counterterrorism. A frequent commentator on the intersection of domestic and international legal institutions, Pildes recently published "Conflicts Between American and European Views of Law: The Dark Side of Legalism" in the *Virginia Journal of International Law*. He has shared his scholarship on domestic institutional handling of terrorism cases with gatherings of federal judges, organized by the Law School's Institute of Judicial Administration. These types of efforts to assist policy-makers, government officials, think tanks, and the media are extended through the Center's online reading lists and reference materials, including such topics as civil liberties issues, bioterrorism, and ethno-territorial minorities in Western Europe.

Opportunities for student involvement extend beyond the Center's colloquium and other public events. Each summer, the Center helps support Law School students whose internships are connected with counterterrorism, either on a domestic or a global level. These internships facilitate the development of informed next-generation leaders who can address the issues of counterterrorism with a depth of knowledge and a wealth of experience. Meg Holzer ('05) spent part of her first law school summer as an intern at the Organization for the Prohibition

of Chemical Weapons in The Hague. She assisted in information dissemination about the importance of the Chemical Weapons Convention, in operation since 1998, including the treaty's ban on chemical weapons and its goal of encouraging peaceful uses of chemistry. Each summer a student from the NYU School of Law is selected for an internship at Interpol in Lyon, France. The Center also recently announced a new post-graduate fellowship, the Fellowship in Global Counterterrorism at Interpol. Sheridan England ('04) is the first and current fellow. He is working in the Office of Legal Affairs at the agency's offices in Lyon.



Latham & Watkins partner Alice Fisher defended the Patriot Act at the Center for Law and Security's Open Forum on the subject. Seated to her left are moderator Tom Gerety, executive director of the Brennan Center for Justice, and Professor Stephen Schulhofer.

Brennan Center's Criminal Justice Program

The still-developing Criminal Justice program at the NYU School of Law's Brennan Center for Justice provides a much-needed outlet for practical advocacy. Part public interest law firm, part think tank, and part advocacy organization, the Program has pursued diverse projects under the leadership of Professor Stephen Schulhofer and the program's director Kirsten Levingston. The Program challenges popular assumptions about crime and punishment through careful analyses of criminal justice policy and practices, and concerted action to effect reform. Its work thus far centers on effective assistance of counsel, the fair enforcement of the criminal law, and crime and punishment.

The Program's flagship project is the Community Justice Institute (CJI), a resource for community groups, activists, and defenders working to improve policies at the local, state, and national levels. In designing the Institute, Levingston works to move private and public criminal defense practitioners from political isolation to more active involvement in communities. The Institute addresses the increasing alienation experienced by low-income communities as a consequence of criminal justice practices, such as "community policing" that often ignore the views of the communities they purport to protect. Using a methodology known as "community-oriented defense," the Institute encourages the development of partnerships among community organizations—like schools, churches, and social service agencies—and their local indigent defense service providers, so that they might jointly identify mutual concerns and aspirations.

The Brennan Center strives to elevate community voices in the courtroom through its Community Amicus Practice. Using amicus procedures, the Center files briefs in local prosecutions that have policy implications beyond the case at hand, raising issues that the parties may not otherwise bring to the fore. The Center partnered with the Seattle-King County Public Defender's Office to file an amicus brief in *State of Washington v. Lonnie McKinney*, on behalf of criminal defense lawyers in the state of Washington contesting the random running of license plates by law enforcement officers. The brief argued that the practice should be unconstitutional because it entails the exercise of infinite officer discretion, which can lead to racially-biased policing. Although running license plates based on a traffic violation or reasonable suspicion of criminal activity may be a reliable police practice, the brief argued that the Washington state constitution protects its citizens' privacy interests from government "fishing expeditions."

The Center also submitted an amicus brief on behalf of 100 Blacks in Law Enforcement Who Care, an advocacy group, in *People v. Glenn*, urging the New York Court of Appeals to maintain its longstanding prohibition against illegitimate traffic stops, in which police claim to stop motorists for a traffic violation but instead are interested in investigating other activity. Partnering with lawyers at Schulte, Roth & Zabel, the Brennan Center filed an amicus brief in the U.S. Supreme Court in *HUD v. Rucker*, a case challenging the U.S. Department of Housing and Urban Development's "one-strike" policy. Under this policy, public housing authorities may evict tenants and their families if a family member or guest engages in criminal or drug activity, on or off the public housing premises, even if the tenants did not know about the activity.

In its monthly Conversation Series, the Brennan Center has touched on many other important criminal justice themes, such as the status of female offenders and the collateral consequences of mass imprisonment. A conversation held in 2003 featuring

On Leave for a Noble Cause



Professor Ronald Noble has been on leave since 2000 while he serves as secretary general of Interpol, the 181-country international police organization that deals with issues of international terrorism, drug trafficking, money laundering, illegal immigrants, and cyber crimes. When at the Law School, Noble teaches courses on federal criminal law, gun control and gun rights, money laundering, and evidence. While serving in the Clinton administration as undersecretary of the Treasury for enforcement, he also managed to get back to New York City each week to co-teach a seminar on The Regulation of Weaponry in Democratic Society with Professor James Jacobs. At the Treasury, Noble oversaw such critical crime-fighting agencies as the U.S. Secret Service; U.S. Customs Service; Financial Crimes Enforcement Network; Bureau of Alcohol, Tobacco, and Firearms; and Criminal Investigation Division of the Internal Revenue Service. His career in public service has also included a job as an assistant U.S. attorney in Philadelphia, where he ran the criminal division.

As Interpol's chief executive officer, Noble is responsible for the day-to-day work of international police cooperation. Recent accomplishments include an investigation to retrieve items stolen from a Baghdad museum during the war in Iraq; a new international notice for warning police, public institutions, and other international organizations about potential threats posed by disguised weapons, parcel bombs, and other dangerous materials; and the launch of a state-of-the-art global communication system called I-24/7, which provides the capacity to instantly reach law enforcement contact points across the globe and permits police to communicate a range of information, including photographs, fingerprints, and eventually video and audio transmissions.

Noble maintains strong ties with the Law School. He was the moderator at the recent antiterrorism conference held in Florence at NYU's La Pietra campus (please see story on page 57), he gave the Law School's 2002 commencement speech, and he moderated a panel on post-September 11 national security for the 2003 Reunion. — J.B.



Professor Stephen Schulhofer: a champion for civil rights during wartime

Dr. Paul Street, vice president of research and planning for the Chicago Urban League, illuminated the contrast between the massive public, media, and policy-maker attention given to welfare reform and the virtual neglect of racially disparate mass incarceration and felony-marking. Street's talk explored the direct and indirect social, economic, and political damage inflicted on U.S. communities of color by mass incarceration, including its impact on the census, voting power, and budget allocation. Lectures like this pull in students as well as practitioners and policy-makers.

Stephen Schulhofer: Voice of Reason

Stephen Schulhofer, the Robert B. McKay Professor of Law, finds the Brennan Center's research support indispensable to his work on civil liberties and the war on terrorism, including his recent contributions to amicus briefs in the *Korematsu* and *Guantánamo Bay* prisoner rights cases in the U.S. Supreme Court. Research assistance funded by the Brennan Center laid the foundation for much of the briefs' historical review of U.S. civil liberties violations during wartime. Fred *Korematsu* first appeared at the U.S. Supreme Court during World War II when he refused, as an American citizen of Japanese descent, to be interned. He was prosecuted and convicted at the time, only to have his conviction thrown out decades later, and to be awarded the Presidential Medal of Freedom. *Korematsu* stepped forward again last year on behalf of military detainees being held without charge or access to counsel to argue that the United States must "respect the principle that individuals may not be deprived of their liberty except for appropriate justifications that are demonstrated in fair hearings."

As part of its ongoing efforts to bring moderation to debates on tactics deployed in the name of counterterrorism, the Center on Law and Security hosted "The USA Patriot Act: Where Do We Go From Here?" The event featured Schulhofer and Alice Fisher, partner in the litigation department of Latham & Watkins and former deputy assistant attorney general of the U.S. Department of Justice Criminal Division, and was moderated by Tom Gerety, executive director of the Brennan Center for Justice.

In Fisher's view, the Patriot Act has unjustifiably become "the bogeyman for civil libertarians," mischaracterized as privacy-invasive and rights-denying despite full congressional and judicial oversight of its implementation. Schulhofer responded with the argument he has made in his book *The Enemy Within* and in his testimony before the National Commission on Terrorist Attacks Upon the United States (the 9-11 Commission): "The legal issues concerning the scope of the Patriot Act are much less important than people on either side of the debate think." The main obstacles to effective counterterrorism efforts, Schulhofer says, "are agency culture; human deficits; and budgetary, technological, and organizational deficits that prevented our national security apparatus from using the legal tools they had." He pointed out that federal law enforcement authorities had identified Zacharias Moussaoui as a risk before September 11 and even had legal authority to search his computer, "but they dropped the ball."

Since then, many legal experts have been saying that to fight terrorism we need to shift the balance between liberty and security. This analysis is misguided, Schulhofer says, and diverts us from more important needs like upgrading technology, improving training and communications, and resetting law enforcement priorities. Although conceding that some aspects of the Patriot Act were helpful and inoffensive, Schulhofer asserted that there have been "more than a dozen initiatives since 9/11 that impair freedom and are not relevant to fighting terrorism." In his view, maximizing security does not require more surveillance laws; it requires more resources to protect soft targets like ports, chemical plants, and weapons facilities.

In the long run, according to Schulhofer, it is more critical to the U.S.'s national security that it uses its power responsibly and consistently with the rule of law. He sees overbroad and invasive counterterrorism measures as "purchasing short term gains at the price of fostering animosity of recent immigrants, Muslims abroad, and democratic nations everywhere."





This op-ed by Stephen Schulhofer was originally published on July 3, 2003. Since its publication, the U.S. Supreme Court has reviewed cases concerning the detention of terrorism suspects, including the Padilla case discussed here. Although a definitive ruling on the Padilla case was sidestepped, in a sister case concerning the detention of Louisiana-born Yaser Esam Hamdi, the Court ruled that U.S. citizens and foreign nationals held at Guantánamo Bay may challenge their treatment in U.S. courts, and should be allowed access to attorneys. Ultimately, the Court's rulings largely uphold the position that Schulhofer argues for in this piece, though the decisions left open many details about exactly what the limits on presidential power would be.

American Injustice

In times of war, can the president imprison someone indefinitely, with no access to the courts or to anyone in the outside world?

That's the power that the Bush administration has claimed once again. Its actions have drawn scant attention or protest. Yet they lie far outside the accepted bounds of constitutional democracy, by our own traditions and the contemporary standards of all other Western nations.

Ali Saleh Kahlal al-Marri, a student in Peoria, Ill., was being held for trial on charges of lying to the FBI, but the Bush administration declared him an "enemy combatant" June 23 and transferred him to a Navy brig in South Carolina. Relying on undisclosed sources, the president determined that Mr. al-Marri associated with al-Qaida and therefore should be held incommunicado indefinitely, with no detour for the formality of a trial.

Mr. al-Marri came here from Qatar, but the administration claims the same power over American citizens. Jose Padilla, an American arrested in Chicago in May 2002, is being held in the same Navy brig. For more than a year, he has had no contact with the outside world. Like Mr. al-Marri, Mr. Padilla is suspected of having plotted with al-Qaida, but neither he nor his lawyer has been allowed to respond to that charge and no court has examined the basis for it.

These are glaring departures from ordinary rules of law. But Americans largely like and trust President Bush. So, compared with the risk of a devastating terrorist attack, are safeguards against government abuse all that important?

Yes. We are not concerned here with abstract principles or legal fine points. Checks and balances are the foundation of constitutional government. Without them, it's not just outsiders and those who are different (in this case Muslim-Americans) who pay a steep price. Secrecy and unilateral executive power invariably breed official arrogance, incompetence, discrimination and corruption.

Secrecy and unilateral executive power sow division and mistrust. Probably no chief executive in our history was more fully trusted and revered than George Washington. Yet the Founding Fathers, led by Washington, insisted that presidential power be subject to the check of an independent judiciary.

Fortunately, we need not choose between unchecked terrorist threats and unchecked dangers of executive abuse. National emergencies call for fine-tuning our due process system, but we need not abandon trials altogether. Judges and defense counsel can be subjected to security clearances, and evidence can be screened in closed hearings to protect secret material. We have used such safeguards for years without difficulty in sensitive national security cases.

Throughout our history, even in wartime, the Supreme Court has insisted that detention be under the control of independent civilian courts, except when dealing with acknowledged members of our own or an enemy's armed forces. To treat suspected enemies the same way is to assign infallibility to presidential assessments of raw intelligence and to assume away the reason for having courts in the first place.

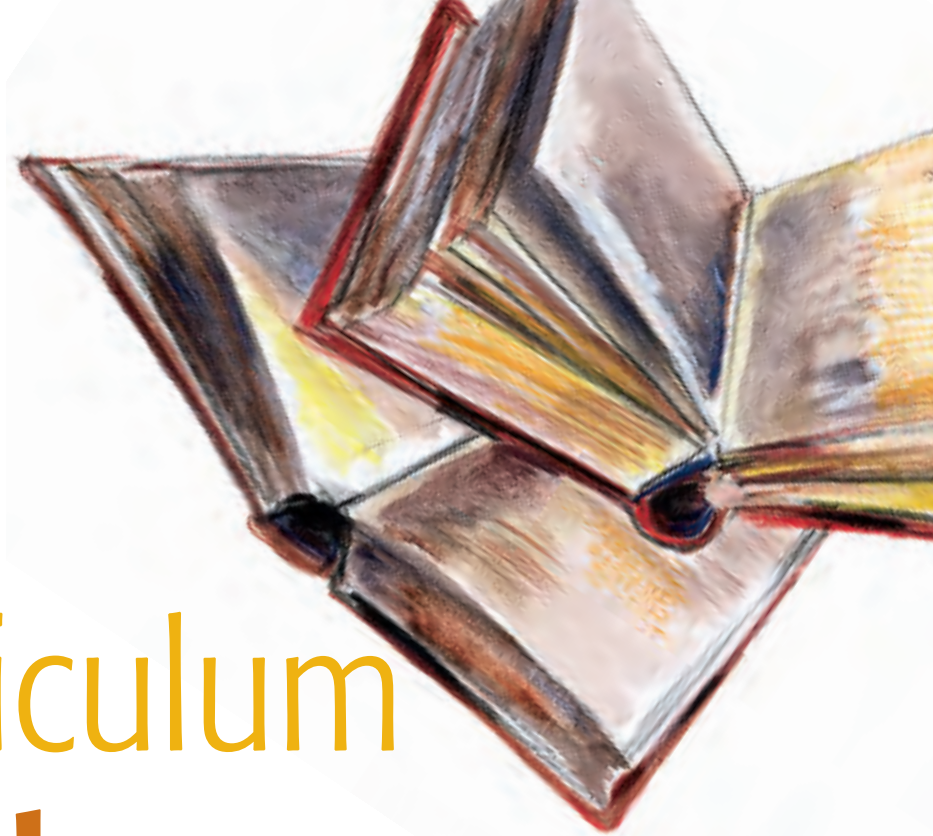
This is not a partisan political point. Britain, when it faced devastating terrorism in Northern Ireland, extended executive detention beyond the usual 48 hours. The European Court of Human Rights, which has power to review antiterrorism measures in the European Union, upheld the special measures, but only because detention without a hearing could not exceed seven days and detainees were guaranteed an absolute right to consult a solicitor 48 hours after arrest.

Turkey went too far when it detained terrorism suspects without access to lawyers for 14 days. The European court found Turkey's more extreme measures impermissible, even in response to lethal terrorist attacks that had claimed more than 4,000 civilian lives in its Kurdish border region. The Council of Europe has reaffirmed, post-Sept. 11, that prompt judicial control over detention is essential to the rule of law. Yet Mr. Padilla has been held incommunicado for more than a year.

There should no longer be confusion or equivocation about Bush administration claims of power to detain alleged "enemy combatants." The erosion of checks and balances, through pervasive secrecy and efforts to shield executive action from scrutiny by Congress, the courts, the public and the press, destroys accountability and weakens law enforcement far more than it protects us.

No less than other nations, the United States has the strength to fight terrorism effectively without abandoning our commitment to constitutional government.

By Stephen J. Schulhofer
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The Curriculum Is Criminal

For breadth of subject matter and depth of inquiry, the NYU School of Law's criminal law and justice curriculum is exceptional. The required first-year course in Criminal Law is just the first chapter of a fascinating exploration of criminal law and procedure jurisprudence and policy. Upper-year courses, colloquia, and seminars offer a wide range of perspectives on criminal law, including theoretical, sociological, empirical, and international. Students who are interested in criminal law practice can enroll in clinics where they apply their classroom learning to hands-on work for defense counsel, prosecutors, law enforcement, social services providers, or community outreach programs. "My experiences with the criminal law program were fantastic," says Nathaniel "Nik" Kolodny ('04). Kolodny's accumulated experiences in his first-year criminal law class, Professor S. Andrew Schaffer's criminal procedure class, and Professor Anthony Thompson's Offender Reentry Clinic led to his third-year writing project on the collateral civil consequences of criminal behavior. "This is an amazing criminal justice department," says Professor Thompson. "No other law school offers the range and strength of NYU's program."

The First Year's Core Curriculum

The first-year introductory course in Criminal Law covers the general principles and elements of criminal liability and defenses. Learning the basics of criminal law in the 21st century does not entail paging through the penal code and memorizing the definitions of particular crimes. Rather, the course is organized by general concepts that cut across all criminal conduct: act and omission, causation, mental state, attempt, and conspir-

acy, and defenses such as necessity, duress, self-defense, and insanity. In addition, the syllabus explores the theoretical underpinnings of such topics as justifications for punishment, grounds for exculpation, culpability for inchoate and anticipatory crimes, and group criminality. What truly distinguishes NYU's criminal law course is the passion its faculty brings into the classroom. Professor David Richards, who has taught the subject matter for almost 30 years, explains how he continues to ignite his students' interest: "As a teacher you have to frame things from your gut, from what really interests you."

Two other first-year courses offer valuable skills and perspectives to students interested in pursuing careers in criminal law. The required first-year course on the Administrative and Regulatory State equips students to evaluate critically the many important criminal justice decisions that are made outside the courtroom and in administrative settings, for example, initiating a criminal investigation, drafting the charge, plea bargaining, establishing sentencing guidelines, managing correctional institutions, and ruling on and monitoring parole. The first-year Lawyering Program, with its closely structured, collaborative experiences of law in use, is especially critical to the training of a criminal lawyer, a career which typically allows for only the briefest apprenticeship before a young lawyer is thrust into positions of life-or-death responsibility. Many of the lawyering faculty are specialists in criminal law, and regularly participate in the criminal law group's programs. Faculty members include Jenny Roberts ('95), a staff attorney and trial trainer at the New York City Legal Aid Society's Criminal Defense Division; Marshall Miller, a former Assistant United States Attorney for the Eastern District; Tigran Eldred, a criminal defense lawyer who has worked at the Criminal Appeals Bureau and the Federal Defenders Division of the Legal Aid Society, and at Appellate

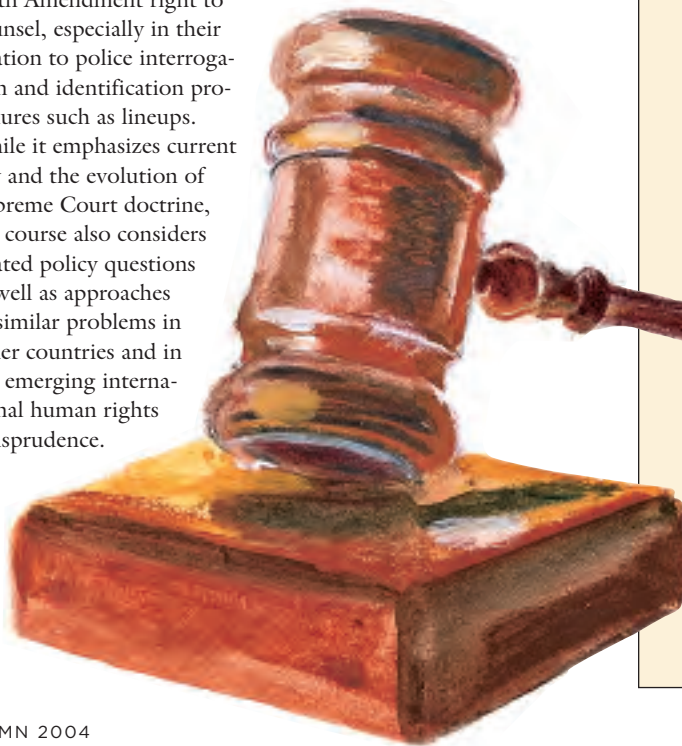
Advocates; and Babe Howell ('93), who was a criminal defense lawyer in Legal Aid's Criminal Defense Division and the Neighborhood Defender Service of Harlem.

Advanced Coursework

The Upper Years' Foundational Courses

Students interested in criminal law usually begin their second year by taking Evidence and one or more of several advanced courses in specific areas of substantive and procedural criminal law. The most essential of these is a course in criminal procedure. While most law schools offer a single, basic survey course in criminal procedure, NYU law students can choose among a variety of approaches to the subject. A comprehensive survey course is taught by Adjunct Professor S. Andrew Schaffer, a former assistant U.S. attorney in Manhattan and general counsel for New York University. This class examines all of the investigative and adjudicatory stages of the criminal process, through trial, including an analysis of constitutional and statutory provisions and judicial decisions governing the various procedural steps in the administration of criminal justice in federal and state courts. Drawing on Professor Schaffer's knowledge of how the criminal justice systems works at ground level, the course covers arrests, stops and frisks, searches and seizures (including wiretapping), interrogation, grand jury proceedings, and trial-related problems such as competence of counsel, the requirement of proof beyond a reasonable doubt, guilty pleas and plea bargaining, discovery and the prosecutor's duty to disclose exculpatory evidence, and jury selection.

A second option for students interested in criminal procedure is Criminal Procedure I: Police Investigations, which covers the first half of the criminal process—police investigation of crimes. Taught alternatively by Professor Stephen Schulhofer or Barry Friedman, the Jacob D. Fuchsberg Professor of Law, who is a prominent constitutional scholar, this course deals with the federal constitutional limits on government authority to gather evidence and investigate crime. It covers Fourth Amendment limits on search and seizure, arrest, electronic surveillance, the Fifth Amendment privilege against self-incrimination, and the Sixth Amendment right to counsel, especially in their relation to police interrogation and identification procedures such as lineups. While it emphasizes current law and the evolution of Supreme Court doctrine, the course also considers related policy questions as well as approaches to similar problems in other countries and in the emerging international human rights jurisprudence.



A View from the Aisle

It is 2004 in a packed classroom on Washington Square, but the students inside are back on the streets of 1930's Brooklyn.

"Violence, greed, and sex," Professor Stephen Schulhofer announces to the first-year law students about to embark on a semester in crime, listing the three reasons for illicit behavior.

The class proceeds to dissect the first reading assignment of the course, the 1930 case of *People v. Zachowitz*. The facts are suffused with two of the three reasons: the defendant shot a man who had insulted his wife. But Schulhofer quickly dispatches any misapprehension among his 120 would-be Ellenor Frutts or Jack McCoys that studying criminal law will resemble a season of *The Practice* or *Law & Order*.

"The purpose of criminal law," he says, "is to take highly charged, volatile social dynamics and impose systematic rules so that society's responses to its worst impulses, to violence, greed, and sex, are predictable, consistent, and fair." Criminal law, explains Professor Schulhofer, is the study of the relatively detailed, technical rules society has developed to control crime, to satisfy social demand for punishment, and to control the government's response to crime. Criminal law may start off sounding intrinsically interesting because of the powerful emotions involved, but its purpose is to reduce those emotions to abstractions in the pursuit of justice.

So, rather than discussing how angry, indignant, or outraged Zachowitz was when he pulled the trigger, the class debates whether the trial court should have admitted evidence of the defendant's gun collection to show his propensity to commit the crime. They also analyze Judge Cardozo's decision overturning the conviction and delineating the rules for admissibility of evidence showing dangerous disposition. Passion nonetheless finds its way into Schulhofer's classroom in the voices of students hashing out the precepts of the basic rule of evidence that determines admissibility by weighing probative value against unfair prejudice. Along the way they discuss the types of evidence relevant to a defendant's mental state, why a defendant is allowed to introduce character evidence when the prosecution is not, and why criminal law focuses on acts and not character.

As much as Schulhofer emphasizes the need to divorce criminal law from the passions that underlie criminal conduct, his students' enthusiasm is undiminished as they swarm the lectern after class to continue the debate. Criminal law's roots in our primal emotions and its centrality to the purpose of government is plainly sufficient to sustain law student fascination with the course, and to beckon a good number of NYU law graduates into the field. — J.B.

Making a Federal Case

As a federal prosecutor for the past 10 years, Samuel Buell ('92) speaks from practical experience—and as a supervisor and colleague of many recent Law School graduates. Buell was on special detail to the U.S. Department of Justice's Enron Task Force from January 2002 to March 2004, commuting back and forth to his home in Boston where he had been serving as an assistant U.S. attorney in the Organized Crime Section. His victory in the Enron-related Arthur Andersen trial followed on a string of successes prosecuting violent drug gangs in Brooklyn and the notorious Winter Hill gang in Boston.

Buell came to the Law School thinking that he would use his law degree to go into government in some capacity, but with no idea of a specific path. He quickly became excited about criminal law in Professor James Jacobs' first-year course with its orientation toward the law enforcement apparatus and the sociology of crime and punishment. "I found criminal law cases much more interesting than other areas of law," Buell says. "Criminal law is the subject where the rubber meets the road in terms of government interaction with citizens." He also studied criminal litigation with Professor Anthony Amsterdam, whose "lawyering" approach to the subject, with in-class simulations of criminal proceedings, paid off for Buell in practice. "The great strength of NYU's criminal law program is how it strikes the optimal balance between theoretical grounding in the law and preparation to put it to use in practice," he says.

After a summer interning at the U.S. Attorney's Office for the Eastern District of New York, Buell was hooked. He spent four more years in the Eastern District after law school and still becomes animated talking about the Brooklyn federal courthouse, where he found a unique working culture fed by a steady diet of cases supplied by organized crime, drug gangs, and airport customs violators. Assigned to the district's Violent Criminal Enterprises initiative, Buell and his colleagues pioneered using the RICO statute outside the organized crime context to attack drug-related gang violence.

But Buell says the nastiest courtroom battles he has fought occurred in Houston, when he found himself up against Arthur Andersen's bulldog lead defense attorney, Rusty Hardin. Courtroom exchanges that the national press routinely described as "open warfare" were peppered with personal attacks on Buell as a "whiner" and "boy scout." As Buell tries increasingly high-profile cases, he has received high marks for maintaining a professional demeanor in the face of "win at all costs" approaches. Buell recommends that no matter where you want to end up practicing law, start in New York City: "Once you've tried criminal cases in New York, you've passed the litmus test and you can get hired anywhere." — J.B.

Alternatively, or in connection with the Police Investigations course, students may take Professor James Jacobs's Criminal Procedure: Bail to Jail. This course covers criminal procedure from the point of the suspect's first appearance in court, through the appointment of counsel, charging, discovery, plea bargaining, trial, sentencing, appeals and habeas, and finally, defense and prosecutorial ethics throughout the process. Students also can take Jacobs' Federal Criminal Law, a substantive criminal law course that examines the jurisprudence of a whole range of complex federal crimes, including mail fraud, securities fraud, RICO and Hobbs Act infractions, money laundering, criminal civil rights violations, and corruption and bribery. Attention is also devoted to the federal sentencing guidelines. An overarching theme of the course is the proper role of federal criminal law and federal law enforcement agencies. Students explore such topics as how to account for the inexorable expansion of federal criminal law, and what are the consequences for this expansion.

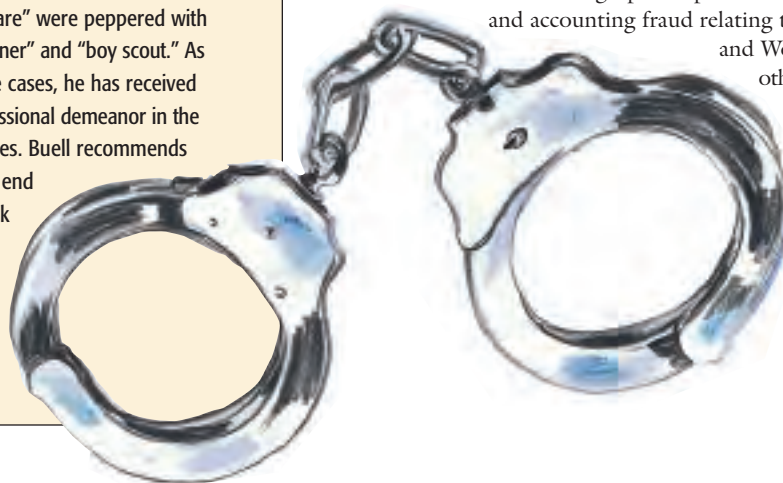
In his popular course Juvenile Justice, Jacobs covers the full range of criminal procedures applicable to juveniles. These include: searches and seizures, pretrial interrogation, confidentiality, intake and diversion, pretrial detention, transfer to adult court, right to counsel, sentencing, and conditions of confinement. Students augment casebook study with scrutiny of juvenile criminal records, analysis of empirical studies and materials on juvenile crime and the handling of juvenile offenders in other countries. The course takes students beyond recent sensational headlines of high school shootings and child prostitution to the jurisprudential and sociological underpinnings of juvenile crime and the possible legal and policy alternatives that are available.

Rounding out the substantive foundational courses is Business Crime. NYU is one of the few law schools in the country that offers this course on a regular basis, with two faculty members on hand to teach it—Professors Jennifer Arlen and Harry First. The two are now collaborating on a casebook dealing with this topic, as mentioned earlier. The course examines the substantive and procedural law problems associated with high-impact economic crime committed by corporations and their managers. An overarching topic of the course is the question of whether criminal liability is appropriately imposed on organizations for economic behavior. On the substantive side, topics include discussion of the basic federal criminal laws used against economic crime (including mail and wire fraud, and violations of RICO and the Sherman Act), principles for imposing individual and corporate criminal liability under these statutes, and the sanctions that can be imposed under the federal sentencing guidelines. On the procedural side, topics include constitutional and common law corporate privileges, the grand jury, immunity, and government evidence gathering. In the wake of the

recent wave of high-profile prosecutions for securities and accounting fraud relating to Enron, Tyco,

and Worldcom, among others, the Business

Crime course has been fully subscribed and student interest in the subject matter only continues to intensify.



Seminar Offerings

Seminars offered by the Law School's adjunct faculty have shown particularly strong appeal, starting with Corruption and Corruption Control taught by adjunct professor Ronald Goldstock. Goldstock can count among his many accomplishments in the field of criminal justice the creation of the Independent Private Sector Inspector General Program, through which business organizations are required to hire private sector watchdogs to monitor their affairs for unethical and illegal conduct. His seminar analyzes the types of corruption that exist in both the public and private sectors, the means by which a variety of criminal and nontraditional remedies may be used to reduce the frequency and impact of corrupt activities, and the constitutional and statutory problems that are implicated by such schemes. Goldstock journeys through the various provinces of corruption—each of the three branches of government and assorted sectors of industry. “I want the students to think about why vulnerabilities to corruption exist, and the types of controls that would work in each setting,” he says.

With his experience as director of the New York State Organized Crime Task Force for 13 years, and as a consultant to the Northern Ireland Organized Crime Task Force, it is no surprise that Goldstock also teaches the seminar on Organized Crime Control. This class explores the variety of challenges organized crime

poses to society and to traditional law enforcement techniques. Goldstock tries “to get the students to think about the practical problems of controlling organized crime, using the law as a means, not an impediment, to breaking up criminal organizations.” In simulated investigations, Goldstock and his students explore how search and seizure law, physical and electronic surveillance tools, documentary evidence, undercover investigations, and grand jury proceedings can be used to gut the mob. At one point, students examine a recalcitrant witness before the grand jury. The RICO statute is also explored in detail as are a variety of noncriminal remedies including forfeiture and court-imposed trusteeships. Student papers written for this seminar have ranged from defining probable cause to the comparative jurisprudence of electronic surveillance in the United States and Japan.

With Professor Jacobs, Goldstock will be teaching a new seminar this year, Privatization of Criminal Justice. In recent years, there has been a trend toward private firms providing guard and protective services, building and managing penal institutions, and providing mediation and conciliation services as a substitute for the state-run legal system. Even those of us who have little interaction with the criminal justice system experience the effects of its increasing privatization in the form of gated communities, private video surveillance, business loss prevention methods, office building security, and citizen foot patrols and radio-alert networks. This

A Clash of Conscience and Responsibility

When Jamie Orenstein ('87), who was sworn in as a magistrate judge last spring, worked as a prosecutor, he helped convict mob boss John Gotti. Later, Orenstein was detailed to Denver to serve as one of the prosecutors who convicted Oklahoma City bombers Timothy McVeigh and Terry Nichols. During his years in the Eastern District U.S. Attorney's Office, he rose to the position of deputy chief of the Organized Crime and Racketeering Section.

The Oklahoma City bombing case, more than any other, highlighted the tension between public duty and private conscience for Orenstein, an opponent of the death penalty, who frequently writes and speaks on the topic. “When I signed up for the system, I signed up for its rules,” he says of his stint as a federal prosecutor. Even though he thinks the death penalty is a bad choice for society, given that the Oklahoma City bombing was, at that point, the single most horrible criminal act committed on U.S. soil, it was important to pursue the death penalty against McVeigh and Nichols; otherwise, it would be difficult ever again to seek the death penalty in some less heinous case. A prosecutor cannot selectively opt out of the system he is defending, he notes.

Orenstein's thoughtful approach to his duties as a prosecutor garnered him numerous awards and commendations, including twice receiving one of the Justice Department's highest honors, the Attorney General's Award for Distinguished Service. Following his Denver assignment, Orenstein served in the Department of Justice's (DOJ) Office of Legal Counsel, advising the president and the attorney general on constitutional law. From 1999 to 2001, he served as associate deputy attorney general and chaired the DOJ's working group handling the civil litigation and internal and congressional

inquiries arising from the incident at the Branch Davidian compound near Waco, Texas. He also advised former Attorney General Janet Reno on criminal law matters, including the death penalty. “Janet Reno is personally opposed to the death penalty but sought it more than any other attorney general in history because she did her job in good faith,” Orenstein says. “That's the tough part of public service.”

Orenstein eventually returned to New York City, his hometown, for a stint as a partner at Baker & Hostetler doing white-collar criminal defense work and corporate investigations. Orenstein also rejoined the Law School's adjunct faculty, where he co-teaches the popular Complex Federal Investigations seminar with former Eastern District colleague, and now U.S. District Court Judge, John Gleeson. Many of the crowd that sparked Orenstein's interest in criminal law are still here, like adjunct S. Andrew Schaffer and the Edwin P. Webb Professor of Law David Richards, and he is impressed by the current diversity of faculty and course offerings. Reflecting on his academic experience, Orenstein comes back to the professors who “seemed to really enjoy teaching and were interested in the law as something that can and should make sense, that is an active force in society, not just a set of rules on the back of the game board.” Reminiscing about Schaffer's criminal procedure class, Orenstein recalls the excitement being palpable. “I was sitting in class on the day that John Gotti beat his first criminal case on March 13, 1987,” Orenstein says, “and all I kept thinking was I hope this guy is around when I'm a prosecutor so that I can get a piece of him.” Five years later, the jury was issuing a guilty verdict in the Gotti case—tried by Orenstein and Gleeson. —J.B.

seminar looks at the ramifications of outsourcing to private firms the various functions of criminal justice administration that have traditionally been the exclusive domain of the state. Students are encouraged to consider the comparative effectiveness of the private versus state-run criminal justice system.

The seminar Complex Federal Investigations is taught by the two former federal prosecutors who convicted John Gotti: Judge John Gleeson of the Southern District of New York, and Jamie Orenstein ('87), who also helped convict Oklahoma City bomber Timothy McVeigh and who is now a magistrate judge in the Eastern District of New York. In examining the problems and issues that arise in complex federal investigations, the seminar addresses topics such as the powers and use of the federal grand jury, including recent efforts to reform it; the investigative use of immunity, contempt, and perjury; the use of bugs, wiretaps, and confidential informants; the negotiation of cooperation agreements and the use of accomplices witnesses; investigative contacts with persons represented by counsel; the various ways such investigations can intrude upon the attorney-client relationship (including through attorney subpoenas and disqualification); the joint defense privilege; and the fundamentals of the RICO statute.

Judge Gleeson also teaches the popular seminar Sentencing. This course looks at the purposes of the federal sentencing guidelines and the extent to which they actually inform sentencing today. The seminar examines the sentencing reform movement of the 1970s and 1980s that resulted in the United States Sentencing Guidelines, which students study in great depth. Current themes in sentencing reform also surface, including the issues of sentence bargaining and judicial discretion under the guidelines. Drawing on Judge Gleeson's wide contacts in the criminal justice system, the seminar involves the various participants in the sentencing process: judges, prosecutors, defense attorneys, probation officers, and inmates.

Professor Randy Hertz, the director of the Law School's clinical program, teaches a seminar entitled Criminal Litigation, which uses a simulated criminal case to explore the ways in which lawyers use substantive criminal law, criminal procedure, and the rules of evidence in the course of prosecuting or defending a criminal case. The focus is on litigation planning, particularly the development of a coherent theory of the case and strategies for implementing that theory. Students research applicable law, investigate facts (by planning and conducting a series of investigative interviews), devise an overall litigation strategy (including a suppression motion), think

through the defense and prosecution theories of the case at both the suppression motion and the trial, and conduct simulated witness examinations at both proceedings.

Of the full-time faculty, Professor Jacobs has offered the most eclectic group of seminars over the years, in addition to the ones he co-teaches with Judge Gleeson and Goldstock, reflecting his diverse interests in criminology. Fans of his highly acclaimed book *Can Gun Control Work?* can search for answers in *Gun Control: The Regulation of Weaponry in Democratic Society*. In this seminar, Jacobs takes a wide-ranging and interdisciplinary look at the regulation of weaponry. Time is spent first discussing the nature of the problems that can arise out of private gun ownership. Then, the course exam-

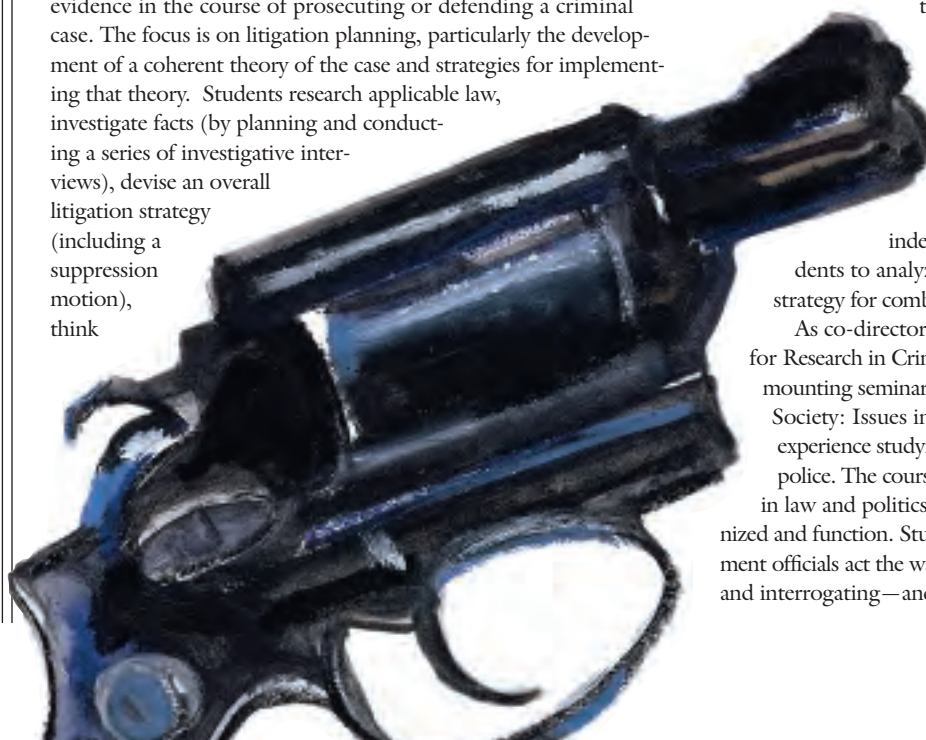
Even those of us who have **LITTLE INTERACTION** with the criminal justice system **EXPERIENCE THE EFFECTS** of its increasing privatization in the form of gated communities, **PRIVATE VIDEO SURVEILLANCE**, business **LOSS PREVENTION** methods, office building security, and citizen **FOOT PATROLS** and radio-alert networks.

ines the conception, implementation and enforcement of federal law (for example, the Brady law) that seeks to keep firearms out of the wrong hands, and of other gun controls like the assault rifle ban and efforts to ban "Saturday Night Specials." Time permitting, Jacobs also looks at the regulation of knives, chemical weapons, and explosives. The seminar examines the way that criminal sentencing law handles crimes committed with deadly weapons and deals with questions of federalism and the Second Amendment. It also covers tort suits against gun manufacturers and a range of new proposals including smart-gun technology, trigger-locks, and one-gun-per-month.

Anticipating his next book, Jacobs also teaches a seminar on Labor Racketeering and Union Democracy, which covers the relationship between organized crime and organized labor. Jacobs and his students examine the range of labor racketeering schemes including extortion of employers (labor peace) and union members, thievery from the union, pension and welfare fraud, violence against dissidents, and the policing of employer cartels. The seminar also probes governmental responses to labor corruption and racketeering, including the Anti-Racketeering Act of 1934, the Hobbs Act, the Taft-Hartley Act, ERISA (Employee Retirement Income Security Act), the Landrum Griffin Act, and the use of civil RICO (and court-appointed trustees) to purge racketeers from mobbed-up unions.

Jacobs encourages his students to think independently on these issues: "I want my students to analyze whether union democracy is a viable strategy for combating labor racketeering."

As co-director with Jacobs of the Law School's Center for Research in Crime and Justice, Jerry Skolnick keeps pace in mounting seminars that excite and edify. In *Police, Law and Society: Issues in Democratic Policing*, he brings 30 years' experience studying the history, sociology, and politics of the police. The course explores the origins of democratic policing in law and politics, and the way police departments are organized and function. Students are encouraged to ask why law enforcement officials act the way they do—in patrolling, searching, seizing, and interrogating—and what are the occasions, explanations, and



Criminal Law Seminars



David Garland

- ▲ The Death Penalty: Social and Historical Perspectives

Judge John Gleeson

- ▲ Sentencing

Judge Gleeson and U.S. Magistrate Jamie Orenstein ('87)

- ▲ Complex Federal Investigations

Ronald Goldstock

- ▲ Corruption and Corruption Control
- ▲ Organized Crime Control

Judge Richard Goldstone

- ▲ The Law of War and International Criminal Courts

Randy Hertz

- ▲ Criminal Litigation

Stephen Holmes

- ▲ Political Trials: Dilemmas of International Criminal Law

James Jacobs

- ▲ Gun Control: The Regulation of Weaponry in Democratic Society
- ▲ Labor Racketeering and Union Democracy

James Jacobs and Ronald Goldstock

- ▲ Privatization of Criminal Justice

Youngjae Lee

- ▲ Criminal Law Theory and the Constitution

Stephen Schulhofer

- ▲ Indigent Legal Defense

Jerome Skolnick

- ▲ Police, Law and Society: Issues in Democratic Policing
- ▲ Regulation of Vice

Bryan Stevenson

- ▲ Capital Litigation
- ▲ Race, Poverty & Criminal Justice

Harry Subin

- ▲ Federal Criminal Practice
- ▲ Sex Crimes

remedies for police brutality, corruption, and perjury. As the nation's leading expert on police integrity and accountability, Skolnick is uniquely situated to guide his students in a dialogue about the kind of rules, organizations, and institutions that are appropriate and effective for maintaining police accountability in a democratic society.

In Skolnick's seminar on the Regulation of Vice, he brings his measured professionalism to bear on such raw subjects as the sex-trafficking trade and heroin addiction. The course starts off asking what vice is, and how it differs from crime, and then moves on to explore a range of vices involving gambling, sex, and drugs—legal and illegal. Skolnick digs beneath the penal code definitions to inquire into the etiology of deviant behaviors and the sociological underpinnings of morals legislation. The students weigh the pros and cons of decriminalizing vice, and whether and how to regulate it if it does not violate the penal code. "I am less interested in the specific laws governing the prosecution of vice crimes," says Skolnick, "than in the social and cultural developments that account for fluctuations in public and law enforcement interest in such crimes."

Professor Bryan Stevenson teaches two of the most popular seminars in criminal law. In *Race, Poverty and Criminal Justice*, the class examines the influence of race and poverty in the administration of the criminal justice system. The seminar explores the effects upon the criminal justice system of conscious and unconscious racism and a variety of mechanisms that disadvantage the poor. The subjects covered in the course include racial disparities in charging, discretionary judgments in the prosecution of criminal cases, and the formulation of crime policy in the United States. The course considers the effectiveness of anti-discrimination law in the area of crime and punishment.

Stevenson, a nationally renowned capital defender who teaches the Law School's Capital Defender Clinic in Alabama, also teaches a seminar entitled *Capital Punishment Law and Litigation*, which examines the constitutional and legal structure of capital punishment and the procedures regulating capital trials, appeals and post-conviction litigation. The seminar explores the factors that may affect the use of the death penalty, including political considerations, perceptions of crime, race, and poverty. The course appraises the degree to which litigation strategies have and have not succeeded in responding to problems in the administration of the death penalty.

Professor of Law Emeritus Harry Subin's course on *Sex Crimes* allows students to explore in depth the complex and sensitive issues that arise when the criminal law is used to prevent and deter what might most inclusively be called unwanted sexual conduct. The course reviews developments in statutory and case law defining sex crimes, with particular emphasis on the crime of rape. Students also explore problems of proof that impede prosecution in sex crime cases, and the evidentiary reforms designed to address those problems. In addition, the seminar examines the efforts of mental health professionals to identify and treat sex offenders suffering from various forms of mental disorder, as well as the constitutional and policy issues surrounding various preventive sanctions, including civil commitment, chemical castration, and sex offender registration laws.

Subin also teaches *Federal Criminal Practice*, a study of the process by which a federal criminal case is developed and resolved by prosecutors and defense attorneys. Students scrutinize a hypothetical case from the point at which the initial decision to prosecute is made through each stage of the process, to disposition by trial or plea and sentencing. Students interested in continuing beyond doctrinal analysis of criminal procedure and evidence law appreciate the seminar's emphasis on how the rules are applied in practice and on the written and oral advocacy skills required of lawyers.

David Garland teaches *The Death Penalty: Social and Historical Perspectives*, an in-depth analysis of the institution of capital

punishment. Using historical and sociological research, students first explore how the forms, functions, and social meanings of capital punishment have changed over time, and what social forces have driven these changes. The class then focuses on the modern American death penalty, and the specific characteristics of the institution that have taken shape in the post-Furman era.

With the richness of these substantive course offerings, three years of law school is simply not long enough to exhaust NYU's criminal law curriculum. Students seeking to construct a "major" in substantive criminal law from NYU's course offerings might consider modeling their schedule on Weston Eguchi's ('04) transcript. Building on the first-year criminal law course, Eguchi studied Business Crimes with Professor First, for whom he later worked as a research assistant, helping update the fraud section of First's *Business*

Crimes casebook. Eguchi also signed up for the two-semester criminal procedure sequence, taking Police Investigations with Professor Friedman and Bail to Jail with Professor Jacobs. The two criminal law seminars taught by Judge John Gleeson also made it onto Eguchi's schedule—Sentencing and Complex Federal Investigations. "I was most impressed with his credentials as a practitioner," says Eguchi, explaining why he double-dipped in Gleeson's classroom. "It's important to experience the practical-minded approach of a judge and a prosecutor, which is where the decisions are made in the criminal justice system." Although Eguchi plans to practice bankruptcy law after graduation, he credits his criminal law coursework with preparing him to deal with the similarly complex procedural environment of bankruptcy proceedings, where the lawyer's role is often to help reconcile multiple opposing interests.

Putting the Law into Practice: Fieldwork Clinics in Criminal Law

Capital Defender Clinic—Alabama

The clinic focuses on representing death-row prisoners on appeal and in post-conviction proceedings. Students work in Montgomery, Alabama, on pending cases currently managed by the Equal Justice Initiative of Alabama.

Capital Defender Clinic—New York

Students in this clinic work with clinical faculty and staff attorneys of the NAACP Legal Defense Fund on death penalty cases, as well as matters relating to capital punishment, habeas corpus, and the criminal justice system.

Community Defender Clinic

Working as consultants to teams of Legal Aid Society lawyers and supervisors, students identify issues regarding criminal justice policy that might be addressed through community outreach, legislative reform, and media advocacy and explore ways that defender offices can play a more effective role in the criminal justice community.

Comparative Criminal Justice Clinic

Students examine how different nations use criminal law to combat domestic violence. Some students work in New York City's criminal defense offices and advocacy organizations. Others are placed in New York City offices of United Nations agencies, non-governmental organizations, and other not-for-profit agencies that work transnationally.

Criminal Appellate Defender Clinic

Students work with the Office of the Appellate Defender on appeals of felony convictions in the New York Supreme Court, Appellate Division, First Department. They write briefs and handle oral arguments in the Appellate Division.

Federal Defender Clinic

Students work with the Legal Aid Society's Federal Defender Division in the Eastern District of New York on misdemeanor offenses such as drug possession, simple assault, weapons possession, and petty theft. Clinic students also assist federal defenders with felony cases in the U.S. District Courts for the Eastern and Southern Districts of New York.



Gabrielle Prisco ('03), argues to a jury in a simulated trial in the Juvenile/Criminal Defense Clinic. Clinic Professor Randy Hertz plays the judge.

Juvenile/Criminal Defense Clinic

Under the supervision of faculty members and staff attorneys in the Legal Aid Society's Criminal Defense Division and Juvenile Rights Division, students take the position of defense counsel in criminal cases in New York Criminal Court and juvenile delinquency proceedings in New York Family Court.

Offender Reentry Clinic

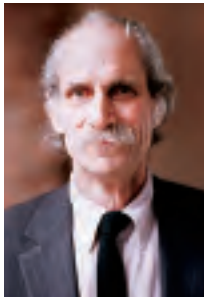
Students assist individual clients on the complex problems faced by individuals returning from prison to the community, such as suing to reinstate employees wrongfully terminated due to prior convictions, and also work at the systemic level to reform policy, for instance, seeking changes in parole supervision policies.

Prosecution Clinic

Conducted in conjunction with the Criminal Division of the U.S. Attorney's Office for the Southern District of New York in Manhattan, students assist in the prosecution of criminal cases in federal court.

Practical Experience

The NYU School of Law's clinical offerings are unparalleled. From established clinics such as the Juvenile/Criminal Defense Clinic to groundbreaking programs in capital punishment and offender reentry, the Law School enables students to put their legal education to work while helping people with real problems.



Professor Anthony Amsterdam

The clinical program is premised on the three-tiered vision of University Professor Anthony Amsterdam, one of the nation's leading law teachers and advocates. The NYU School of Law's first-year Lawyering Program, upper-level simulation courses, and fieldwork clinics are the building blocks for constructing a practical education in the law. As Randy Hertz, professor of clinical law and director of clinical and advocacy programs, puts it, "Clinics and simulation courses place stu-

dents in role so that they can analyze every legal, factual, or strategic issue from the perspective of how it will affect the individual case and the individual client." Clinics teach students a variety of lawyering skills, including problem-solving, working with facts, developing a theory of the case, and making decisions in collaboration with the client.



Professor Randy Hertz

Fieldwork clinics take newly gained lawyering skills to the streets, where in the unsheltered, unpredictable world of legal practice, they start to make sense. "Three years of law school realistically is too short to learn all the skills a lawyer needs to function," Hertz remarks. "The best we can do is teach students cognitive skills, how to work with the law and the facts, and how to learn from experience." Law School graduates credit the dynamic structure of the clinical program with allowing them to "hit the ground running" when they

joined a public defender's office or prosecutorial staff after graduation. "I cannot imagine a criminal law program that better prepares one for the day-to-day practice of criminal law," says Robert Radick ('97), assistant U.S. attorney for the Eastern District of New York.

Students with this kind of training are hot commodities when they graduate. In the Bronx Defenders office, six of 20 public defenders in the community-based alternative defense office are graduates of the clinical program who get to put their training to the test each day. The Public Defender Service for the District of Columbia, universally regarded as the best defender office in the country and the most difficult one at which to get a job, currently employs no fewer than 10 Law School clinic alumni, including five graduates of the Juvenile/Criminal Defense Clinic.

A distinctive feature of the NYU School of Law's clinics is that the faculty who teach them are tenured or tenure-track professors whose sole professional interest is the research and teaching they do at the Law School. Most tireless among these is probably Hertz, who in addition to directing the clinics, runs the innovative *Clinical Law Review*, serves on numerous bar association and court committees, and teaches a triple course load most years. Hertz, who has been with the program since 1985—and was awarded the American Association of Law Schools' William Pincus Award for Outstanding Service and Commitment to Clinical Legal Education last year—is quick to deflect attention from himself: "The superiority of the clini-

Going the Extra Mile for Death Penalty Defendants



The Law School's criminal law faculty is graced with four of the leading thinkers on the death penalty.

Professors Anthony Amsterdam and Bryan Stevenson are nationally renowned for their litigation in the area and both have won numerous awards including the prestigious MacArthur Foundation Fellowship Prize, also known as the "genius award." They teach courses on capital litigation and have written highly influential articles on the subject. Amsterdam's 1972 Supreme Court victory in *Furman v. Georgia* struck down all capital punishment statutes of the time. Stevenson recently represented a death-row inmate before the Supreme Court in *Nelson v. Campbell*, where he successfully argued that a prisoner could challenge the means of execution through a section 1983 action. Professor Randy Hertz, director of the Law School's clinical program, is the co-author of the country's leading treatise on federal habeas corpus practice and procedure, which is regularly used by capital defenders in challenging convictions and sentences. Professor David Garland, who is known for his landmark work in criminology and the sociology of law, teaches and writes about the death penalty and American culture. (Professor Philip Alston's recent appointment by the U.N. Commission on Human Rights as Special Rapporteur on extrajudicial, summary, or arbitrary executions adds even more depth to the Law School's expertise on issues of capital punishment.)

The Law School offers two capital defender clinics. In one, taught by Amsterdam with Deborah Fins, an NAACP Legal Defense Fund attorney, students work on capital cases throughout the country, drafting briefs for use in the federal courts, including the U.S. Supreme Court. In the other—which works in conjunction with the Equal Justice Initiative (EJI), the Alabama-based organization headed by Stevenson—students work on Alabama capital cases with Stevenson and EJI managing attorney Randy Susskind, who is on the Law School's adjunct faculty. Students spend an entire semester in Alabama, finding witnesses, gathering facts, and drafting pleadings on behalf of death row inmates.

Inspired by their exposure to these professors' teaching and writing, the students of the Law School acted on their own initiative to create Law Students Against the Death Penalty, a student-run organization that brings in speakers, disseminates information, and provides assistance to capital defender offices in New York and around the country.

Saving the Children

Derwyn Bunton ('98) wasn't from Louisiana. He wasn't an expert, of all things, on the Louisiana juvenile justice system. But when Bunton graduated from the Law School and took a job with the Juvenile Justice Project of Louisiana, he challenged, fought, and ultimately changed forever the nature and quality of Louisiana's juvenile justice in six short years.

Upon his arrival at the Juvenile Justice Project as a staff attorney (he is now the senior staff attorney), Bunton said that he wrote letters to Governor Mike Foster documenting the appalling level of abuse reported by his clients inside Louisiana's juvenile prisons. When he got no response, Bunton sued.

Once the suit commenced and discovery proceedings at the prison sites began, Bunton was shocked to discover the extent to which the institutions used physical repression, violence, chemical restraints administered by untrained staff, and corporal punishment to subdue and dehumanize the children. The worst, he said, was the Tallulah juvenile corrections facility where he found numerous children with untreated broken jaws from beatings.

Tallulah was closed in June of 2004. Furthermore, during the Tallulah suit, Louisiana opened another juvenile corrections facility that also generated intense complaints of abuse. Bunton filed another suit, and closed the new prison down in just six weeks.

cal program derives from the fact that the NYU School of Law continues to hire the best talent available, who teach what they are interested in. We are not filling niches here; we are constantly interacting and learning from each other. It is an amazing experience to be working with my colleagues on the clinical faculty."

Anthony Thompson: Life Guide for Ex-Offenders

Anthony Thompson, one of Hertz's many accomplished clinical colleagues, founded and supervises the first-of-its-kind Offender Reentry Clinic, which focuses on the complex problems faced by individuals returning from prison to the community. (Please see page 73 for an excerpt of Thompson's recent piece, *Rethinking the Justice System: Crime and the Community*.) Students represent individual clients and also work to reform policies that, on the basis of a criminal record, deny many ex-offenders public housing, certain kinds of jobs, public assistance, educational student loans, and voting rights. The clinic grew out of Thompson's experience working with the U.S. Department of Justice in the late 1990s, when it started focusing on the imminent return of large numbers of ex-offenders to communities with limited resources to provide them safe, affordable housing or viable employment. These individuals frequently faced the painful irony that the training they received in prison to pave their way to a law-abiding life was rendered useless because of state law occupational bars. In New York, for example, most prisons offer vocational training, but many



Professor Anthony Thompson

areas of New York occupational law prohibit ex-offenders from obtaining licenses to work in a range of jobs. As Thompson, a former public defender and private criminal lawyer, became interested in the challenge of representing such a client base, he realized that students could benefit from clinical training in the subject. "Students need to be prepared for the full range of challenges they would face as lawyers representing ex-offenders," he says.

Thompson has become well known in the reentry field as other law schools have begun to identify the issue as key to practical problem-solving for criminal justice clients. He has even helped another law school set up a smaller version of his clinic. The NYU School of Law, he says, offers a unique advantage: "The best criminal justice faculty in the country is on hand to speak to the students, faculty members like David Garland, whose work on penal theory embodies exactly the approach that resonates with reentry programs." Above all, what Thompson wants his students to take away from their clinical experience is a "sense of balance." Students in the reentry clinic are taught that "they have to be sensitive to legitimate concerns employers and others have about folks with criminal records," Thompson says. "We teach students a nuanced approach to convincing people that their biases about ex-offenders are causing them to make bad policy decisions."

Bryan Stevenson: Advocate for the Condemned

Few clients are in as bad straits as those on death row in Alabama. Professor Bryan Stevenson believes that there are too many problems of fairness and reliability with American's criminal justice system to permit capital punishment, especially in a state like Alabama, where he founded and directs the Equal Justice Initiative of Alabama (EJI). In windowless offices in a concrete building, 200 yards from where slaves were auctioned 150 years ago, Stevenson and his students in the Capital Defender Clinic—Alabama, work on death-row cases in a state that has no public defender system. "My interest in doing this is to provide the poor with legal assistance," Stevenson says. "I am not just bringing students down here for the sake of training them, but to meet a critical legal need."

There they engage in fieldwork representing death-row clients in appellate and collateral litigation filed in the state appellate courts, federal district and appellate courts, and the U.S. Supreme Court. Students find themselves frequently on the road to Alabama's three maximum-security prisons, interviewing death-row clients. They also travel the state interviewing clients' family members and other potential mitigation witnesses; reviewing local court files; examining state documents and evidence; and collecting information from jurors, trial lawyers, and other critical bystanders. "Most of the students are in a completely unfamiliar setting," Stevenson says, "and they learn the importance of understanding cultural context, and the dynamics of race, class, and language."

Students also help to prepare briefs, petitions, motions, and on occasion, work on impact litigation designed to reform the environment in which capital cases are litigated. Stevenson is justly proud of the results: "The clinic is the perfect nexus of legal training and education while helping defendants that are literally dying for representation. No other law school offers a program where students spend an entire semester handling a death penalty case at these close quarters."

For Stevenson, the opportunity to involve the Law School in the work of EJI counters the isolation and alienation of working in an



Professor Bryan Stevenson

(continued on page 54)

Turning the Tables in Tulia

With tenacity and a sense of outrage, Vanita Gupta took on racism and the “war on drugs” to free 35 wrongly convicted men and women.

Fresh out of law school, and just three weeks into her job with the NAACP Legal Defense Fund in New York, Vanita Gupta (’01) asked to be sent to Texas. Gupta had learned from a television documentary about a travesty of justice in a small Panhandle town called Tulia. The film described a 1999 drugs sting in which ten percent of the town’s black population was arrested and convicted on the uncorroborated testimony of an undercover cop named Tom Coleman. It turned out that Coleman was prone to using racist language and himself had been arrested for both theft and professional misconduct while carrying out his investigation. “The documentary presented facts that were almost too outrageous to believe,” said Gupta.

By the time Gupta arrived in Tulia in 2001, direct appeals by her 35 clients had already been denied. In short, they had been convicted and were without legal representation. After her initial fact-finding mission, Gupta went back to New York, organized a team of top pro bono attorneys from around the country, and returned as the LDF’s lead counsel for the cases. Nonetheless, the situation looked bleak. “The Texas Court of Criminal Appeals is not known to be a progressive court,” said Gupta, “and in any case it had already affirmed the convictions. So we really needed to blow open the case and expose the law enforcement officials for what they were.”

It may have been temerity for a 26-year-old to take on Texas, but for someone who had grown up in a leafy suburb in southern England, Gupta proved to have the tenacity and resourcefulness of a coyote. She realized she was going to have to turn up the heat on the Panhandle; so Gupta went to the media. In a series of ten articles over eleven months, *New York Times* columnist Bob Herbert described a justice system that seemed little more than a cruel farce.

The attention of the national press forced the Texas media into action. Local papers that had been effusing over Tom Coleman’s status as Texas lawman of the year were suddenly shamed into doing some reporting. The cartel of Tulia drug dealers, it turned out, included a fork-lift driver, a pig farmer and a number of young moms with small children who didn’t know what hit them. The dawn-raid arrests produced no drugs, money or weapons. Officer Coleman, on whose sole testimony the convictions were based, made frequent mistakes in identifying suspects, used racist language in reference to the defendants, and was in the habit of writing down evidence on his leg. And yet, on his unsubstantiated testimony, Gupta’s clients were sentenced to such brutal prison terms that many of them would have died in jail. One defendant received 341 years.

Intense media pressure outside the courtroom was vital, but it had to go hand in hand with an iron-clad argument in front of the bench. Judge Ron Chapman was struck by how well Gupta’s team handled the appeal. “Very impressive,” said Judge Chapman. “They stayed with this case for years when others would have given up.”

Gupta and her team were nothing if not relentless. The first petition was filed in January 2002 on behalf of Jason Jerome Williams. In it were the key arguments that would bring Coleman to court, and eventually undermine all 35 wrongful convictions. In September, with the glare of the national media full in the face of the Texas judi-

ciary, the Texas Court of Criminal Appeals ruled in William’s favor. In the meantime, however, Judge Self, who had presided over most of the original trials, had made public comments to the *Tulia Herald* that suggested the defendants would not receive an impartial hearing in his courtroom. In November 2002, the LDF team upped the pressure by filing for his recusal. Two days later Self stepped down, and was replaced by Judge Chapman. In March 2003, the case for the prosecution dramatically collapsed as Officer Coleman crumbled on the stand. Finally, on August 22, 2003, Texas Governor Rick Perry granted full pardons to all of the defendants.

Gupta, who went to law school intending to do just this sort of work, was in her element. She applied for a Soros Justice Fellowship with the LDF specifically “to work toward reform of a broken system,” she says. Even with that perspective, says Gupta, “Tulia took my pre-existing concerns to a whole new level.”

“There were a couple of moments,” she admits, “when I felt that due to the state of the courts, and the unwillingness of anyone in the justice system to see that an injustice had taken place, we would just never get our clients out of prison.” But Gupta says the clinical training that she received at NYU gave her crucial preparation. “The experience of having clients and discussing strategy in a classroom setting was invaluable in giving me the skills I needed. In my opinion, NYU is unique in having such a strong commitment to clinical education.”

Awarded the 2004 Reebok Human Rights Award in May for her role in coordinating the Tulia trial, Gupta says that the accolade came with mixed emotions. On one hand, she says, “I felt so humbled to be honored alongside such outstanding individuals from Brazil, Afghanistan and Nigeria.” But, she adds, “I thought it was incredible that racial injustice in our criminal justice system should be seen as an international human rights issue. We continually look outside our boundaries for human rights violations, yet they are taking place here on our own soil.”

Adam Levin (’97), another NYU School of Law graduate, worked alongside Gupta and became a key advocate during the hearing. At the time, Levin was senior associate in the pro bono department of Hogan & Hartson in Washington D.C. He went on to lead the civil rights litigation that brought their clients a \$6 million settlement, and instigated the disbanding of the Panhandle Regional Narcotics Task Force.

In October 2003, the Black Allied Law Students Association (BALSA) and the Law Student Drug Policy Forum invited both Gupta and Levin back to the Law School for the first time since Governor Perry pardoned their clients. “My favorite audience when I speak about the case is law students,” says Gupta, who clearly hopes that the trial will inspire others to do criminal defense and social justice lawyering. “It’s wonderful to talk about the possibility of changing people’s lives, and to have them hear from someone who has just graduated and is making a difference.”

But there’s still one more twist to the tale of Tulia; Paramount Studios is due to make the trial into a 2006 feature film. Who will play Vanita Gupta? Halle Berry.

—Dan Bell



Vanita Gupta, with Senator Rodney Ellis, faces the press.

(continued from page 52)

underserved area with few colleagues or peers. The collaboration has allowed him to think critically about his work while “connecting with a community of inspiring and talented scholars and lawyers.”

Aaryn Urell ('01), a staff attorney at the EJI, is grateful: “I cannot imagine another criminal law faculty capable of rivaling the Law School’s in the manifest commitment of its professors to social justice and passion for preparing young lawyers to do meaningful, innovative work in the criminal justice field.”

Holly Maguigan: Gender Defender

How the criminal justice system serves and disserves battered women is the concern of the Comparative Criminal Justice Clinic: Focus on Domestic Violence. Taught by leading battered women’s advocate



Professor Holly Maguigan

and Clinical Professor Holly Maguigan along with Ehrenkranz School of Social Work Professor Shamita Das Dasgupta, the clinic has three components: fieldwork based in New York City representing battered women who are complainants and defendants in cases involving domestic violence; simulations in which students take on the varying roles and perspectives of attorneys, social workers, and clients in a domestic violence situation, coming to understand how to handle the often conflicting agendas each brings to the table;

and a comparative look at the utility of criminal justice interventions in domestic violence cases in the United States and in India.

For the fieldwork component, half of the students work with court-appointed attorneys or public defenders representing women who have been charged with a crime, typically in the context of defending themselves against their abuser. When he represented a woman charged with felony assault against her abuser, Arun Thiruvengadam (LL.M. '02, J.S.D. '05) commented: “This case provided me with a fascinating window into the workings of the U.S. legal system, including from the perspectives of criminal law, comparative constitutional law, and the immigration control regime. I participated in the full range of pretrial criminal law practice from conducting factual investigations to attending hearings on discovery and evidentiary matters.”

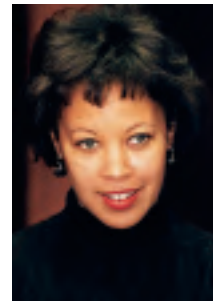
A Clinical Victory

Kathleen Guneratne ('04), as part of the Juvenile/Criminal Defense Clinic, represented a juvenile charged in a chain-snatching case in which the defense had a strong argument of mistaken identity. Guneratne handled a suppression hearing and a bench trial in the case: “The clinic gave me my first chance to try a case and it was truly a rite of passage. At first the judge kept trying to shut me down and it was intimidating trying to put on our defense, which was a solid one based on many unexplained inconsistencies in the complainant’s story. But you don’t have the luxury of stopping to think, so I just kept pushing our theory of the case. In the end, after the judge announced the ‘not guilty’ verdict, he turned to me and said, ‘Counselor, you are going to make a memorable lawyer.’”

The other half of the students in the clinic are assigned to community-based organizations or government agencies that assist battered women who are complainants in criminal cases. Organizations that have collaborated with the Clinic include Sanctuary for Families, New York Asian Women’s Center, and STEPS to End Family Violence. Often the assistance offered by the clinic develops into a strategic alliance to devise and implement new strategies for dealing with domestic violence. The year Irina Taka ('03) enrolled in the clinic, she was assigned to assist Mayor Bloomberg’s domestic violence initiative, known as the Domestic Violence Response Team Program or DiVERT. Taka sat in on meetings among city agencies and law enforcement officials wrestling with the problems of improving coordination and availability of resources to battered women. She helped mediate among overlapping and sometimes conflicting agency mandates, developing protocols for handling domestic violence cases. The program ultimately decided to focus on high-risk precincts, improving coordination with the city’s Housing Authority and Administration of Children’s Services. Taka says, “I wanted to be in on the ground floor of a project like this because I am going back to my native country Greece to work on these issues. Even if the Mayor’s initiative fails, I will have learned something.”

Kim Taylor-Thompson: Cultural Translator

Kim Taylor-Thompson’s Community Defender Clinic takes a different tack in providing defense services to local communities, by partnering with local agencies. Police departments have been experimenting with new forms of crime prevention that emphasize community-based strategies, prosecutors’ offices have begun to acknowledge the importance of maintaining relations with the communities in which they operate, and the judiciary has created drug and youth courts to address recurring problems in a more targeted way. The Community Defender Clinic is similarly premised on the proposition that public defender offices need to emerge from their isolation and engage in the political and social dialogue about criminal justice policy. Says Taylor-



Professor Kim Taylor-Thompson

Thompson: “Comprehensive representation of people charged with crimes means paying attention to the communities from which they come and to which they will ultimately return.”

Taylor-Thompson’s experiences before entering academia lend special weight to her words. She spent a decade working in the Public Defender Service for the District of Columbia, the last three as director of the office, supervising 75 lawyers and 75 staff. More recently, she served as a consultant to the Administrative Office of the U.S. Courts’ federal defender program, working on ways to provide more comprehensive representation of individuals charged with crimes in the federal system. She helped organize and develop conferences and training sessions on what it means to provide excellence in public defense. A 2003 conference focused on issues such as the various meanings of excellence in terms of individual representation, and collaborating with state defender systems for clients who are charged with both federal and state crimes. Attended by judges and representatives of 50 public defender offices across the country, the conference helped develop a network of people and expertise that federal defenders could go to for advice and information.

Taylor-Thompson also has consulted for the United Nations’ Working Group of Experts on People of African Descent. She testified before the working group on the issue of race in governance and judicial systems, drawing lessons from the issues facing African-

Americans in the U.S. criminal justice system. Her testimony has dealt with effective assistance of counsel, racial demographics of public defender offices, and the role of the jury. The recurring theme of Taylor-Thompson's presentations is that judicial systems need to reflect the diversity of the population, or at least provide training so that judges from different racial or ethnic backgrounds are sensitized to other communities to bring considered judgment to the case at hand. "Decision-makers in criminal justice systems must be sensitive to racial and ethnic differences and how those differences may affect a fact-finder's understanding of how a person reacted in the situation at issue, whether the behavior was justified in some way, whether punishment is necessary, and what would be a just punishment," she says.

Beyond the Courses and Clinics

Dean Richard Revesz's monthly roundtable lunches with alumni, including criminal law practitioners, inject even more stimulating discussion into this mix. The 2003-04 schedule included a lively conversation with Stephen Hammerman ('62), deputy commissioner of legal matters for the New York City Police Department, essentially serving as the police commissioner's general counsel. Hammerman, who went to law school at night so that he could work a job to support his young family, inspired the students with his obvious love of the law. Selected students are also invited to the Center for Research in Crime and Justice's weekly luncheons featuring guests speaking on criminal law topics. The Root-Tilden-Kern Scholarship Program's Monday Night Speaker Series on Public Interest Law routinely invites scholars and practitioners who work in criminal justice. Last year, speakers included the Law School's death penalty expert Bryan Stevenson; G. Douglas Jones who revisited "The Prosecution of the Birmingham 16th Street Baptist Church Bombing Cases"; and Derwyn Bunton ('98), senior staff attorney of the Juvenile Justice Project of Louisiana, who described the horrifying conditions he discovered in the juvenile prisons there, and what he did about them.

The activities of several student organizations also intersect with criminal law topics. In 2003, the Law Student Drug Policy Forum hosted a symposium, which featured panels on such topics as the collateral consequences of the war on drugs, drug crimes sentencing, and federal constraints on state drug-policy innovation. The group also seeks to create internship and volunteer opportunities for students, and to collaborate with local drug policy organizations and student organizations in local political activities.

Law Students Against the Death Penalty, formed in response to the passage of New York State's death penalty law in September 1995, offers assistance in fighting the death penalty both in New York and around the country. Members do legal research and review trial transcripts for organizations, such as the Louisiana Crisis Assistance Center, the Georgia Resource Center, and the NAACP Legal Defense Fund. The student group also sponsored a symposium on the future of the death penalty movement, featuring the Innocence Project's Peter Neufeld ('75) and Donald Paradis, a former death-row inmate.

The Prisoners' Rights and Education Project provides inmates in New York state prisons with legal research skills. Each semester, it conducts a seven-week course at prison libraries, mirroring what first-year law students learn in the Lawyering Program.

Other student organizations find fertile ground at the Law School to create programs with a connection to criminal law and justice. Over the past academic year, the NYU chapter of the Federalist Society hosted a half-day conference on "Enforcing Corporate Responsibility Through Criminal Law," debating the extent to which criminal law should be used as a tool for business regulation. Alumni Vanita Gupta ('01) and Adam Levin ('97) visited the

Law School as guests of the Law Student Drug Policy Forum and the Black Allied Law Students Association (BALSA) to discuss their work overturning the infamous *Tulia*, Texas criminal cases where one-tenth of a town's African-American population was convicted of trumped-up charges. The NYU *Review of Law and Social Change* presented a colloquium on the 50th anniversary of the landmark desegregation case *Brown v. Board of Education*, including a panel on what its legacy of equal protection jurisprudence has to say about community policing and racial profiling.

At the colloquium, Liyah Brown ('04) joined Lieutenant Eric Adams, co-founder of 100 Blacks in Law Enforcement Who Care, and Lawrence Rosenthal, deputy corporation counsel for the City of Chicago Department of Law, to examine the effect of the *Brown* decision on U.S. policing strategies. The subject matter was anything but theoretical for Brown, an African-American who grew up in the Bedford-Stuyvesant neighborhood of Brooklyn—"Bed-Stuy" as it is popularly known, especially through rap songs that use it as shorthand for murder and mayhem. Brown remembers it differently: "My neighbors were and still are poor, hard-working people, struggling to get by." She returned to that community after spending the latter half of the 1990s in Washington, D.C., first obtaining her B.A. from Georgetown University and then working for the Japanese Ministry of International Trade and Industry and a public interest law firm. Brown appreciates the transformation of Bed-Stuy, where the murder rate has decreased by more than 70 percent since she was a teenager there. But she still sees an economically desperate community, vulnerable to a police force that has not yet weeded out all officers who cross the line. She explored the question of how community policing can be a means of achieving racial justice in her note, written while she was still in school, *Officer or Overseer?: Or Why Integration of Police Forces Has Failed to Improve Policing in Inner Cities*.

Adams, a 20-year veteran of the New York City Police Department, offered the perspective of a watchdog cop active in challenging police practices that may offend civil liberties. But Rosenthal drew on Chicago crime-fighting experiences to counter that inner-city residents would rather have the city send more police into their neighborhoods than redeploy cops to wealthy enclaves. He described the dramatic reduction in violent crime rates over the past 10 years as a triumph of sociology over jurisprudence.

Brown doubted the efficacy of community policing methods, pointing out that experts disagree on the reasons for declining crime rates. Clearly passionate about criminal justice, Brown will clerk for a U.S. district judge and plans to work for a public defender's office. When one panelist reported that a U.S. Department of Justice survey found that 76 percent of African-Americans are satisfied with their neighborhood police, Brown announced, "I am not satisfied." And she intends to do something about it.

Brown, and others like her, is a successful reflection of the NYU criminal law faculty's dedication to nurturing a sense of mission in their students. The program is part of a proud NYU School of Law tradition, one of mixing practical goals about working to right wrongs with intellectual engagement in the theoretical underpinnings of the profession. When it comes to the practice of criminal law at its finest that really means, essentially, trying one's best to help deliver justice for all. ■



Past Feature Updates

Regulating Regulators

When the U.S. Immigration and Naturalization Service denies refugee status to an individual, the agency is required to follow certain administrative procedures, including giving notice and holding hearings. Disappointed applicants can obtain some judicial review, albeit limited.

But what happens when a similar scenario unfolds at the global level, when the United Nations High Commissioner for Refugees issues such a denial? The applicant has no opportunity for independent review. Similar problems arise in such diverse areas as capital requirements for banks, conditions attached to third world development funding and the setting of product safety standards. All too often, global administrative bodies “are not subject to much in the way of accountability,” says Professor Richard Stewart, the John Edward Sexton Professor of Law, and the director of the NYU School of Law’s Center for Environmental and Land Use Law.

Stewart, along with his colleague Benedict Kingsbury, the Murry and Ida Becker Professor of Law, who directs the Institute for International Law and Justice, launched the Global Administrative Law Project to start a dialogue that they hope will lead to changes in the way both formal and informal international agencies do business, in order to protect rights and provide greater public participation and accountability. This spring, they hosted a colloquium inviting a dozen speakers from the U.S. and abroad to address these issues, including Israeli author, law professor and human rights advocate Eyal Benvenisti, a member of the Law School’s global faculty, and Oxford University’s Bronwen Morgan, an expert on reshaping regulatory laws. Also planned are a project website, a workshop at Oxford in October, and conferences in Italy and at the NYU School of Law next year.

“The question is, what rules govern how global agencies decide?” said Kingsbury. Until recently, for example, the U.N. Security Council could direct states to freeze the bank account of anyone suspected of financing terrorist activities without giving the subject an opportunity to say: “I’m the wrong guy,” said Stewart.

While they’re not advocating a separate court to oversee global agencies, Kingsbury and Stewart suggest that national courts need to create new practices for administrative cases that are international in origin; and more international agencies need to develop

new safeguards like the World Bank did in the early 1990s, when it set up an independent inspection panel to review environmental compliance issues after a controversy about the proposed Narmada dam in India.

“It’s starting to happen, but people aren’t connecting the dots,” Stewart said. ■

Danube Clean-up

When the Berlin Wall fell in November 1989, environmentalists saw an opportunity to knock down another wall—the one that kept the public from environmental information about their beloved, albeit polluted, Danube River. “Once the Wall came down, a lot of information about the status of the environment in Eastern Europe became available,” said Jane Bloom Stewart (’79), director of the NYU School of Law’s International Environmental Legal Assistance Program.



Jane Stewart (’79), left, and Ernestine Meijer.

But government officials weren’t sure what information to provide to the public, and citizens didn’t know where to go or what questions to ask to get information.

Stewart’s program, to be undertaken jointly with the Regional Environmental Center for Central and Eastern Europe and Washington-based Resources for the Future, recently received a substantial grant from the Global Environment Facility to improve public access to environmental information about the Danube and increase public participation in clean-up efforts in five Danube-basin countries: Croatia, Serbia-Montenegro, Bosnia-Herzegovina, Bulgaria, and Romania. The grant comes on the heels of a successful pilot program in Slovenia and Hungary that NYU and its partners conducted in 2002.

This time around, Stewart will be aided by Ernestine Meijer, who joined NYU as a senior research fellow at the Center on Environmental and Land Use Law. A Dutch

environmental lawyer with expertise in working with grassroots organizations, Meijer is an ideal fit. “The idea of the project is to assist in setting up legal and practical measures on public participation that will actually work in these five countries,” said Meijer. “We want people to see it as their project, so that basically by the end of the project we can just tiptoe away and progress will continue without us.”

To that end, Stewart and Meijer and their partners at the REC and RFF will start this Fall by meeting with public officials, environmental organizations, and concerned citizens from the five countries to determine their priorities. If there’s legislation in place, why isn’t it working? “Is it because the laws are unclear or because people don’t know what to do with them?” asks Meijer. The project will continue through November 2006. ■

Bait and Switch?

Professor Katrina Wyman is particular about her fish. She won’t eat endangered Chilean sea bass or snapper. No salmon unless it’s wild from Alaska, as she doesn’t like to eat farmed fish. And unless she’s hungry enough to swallow her principles, her halibut must come from Alaska too, where its catch is regulated by a quota system based on tradable permits.

For the past two years, Wyman, who joined the NYU School of Law faculty in June 2002, has been researching the question of why the U.S. was first to use tradable permits to regulate air pollution, but has lagged behind her native Canada in adopting individual transferable quotas (ITQs) for the fishing industry.

In an ITQ program, government regulators cap the amount of fish per species that can be caught. That amount is divided up and allocated through permits that fishermen can sell to one another. In this way, fishermen are assured a certain percentage of the catch, eliminating the frantic fishing races that exist when governments restrict when, where and how much can be caught. In the long term, ITQs should guard against overfishing.

“Given the crisis in our fisheries, why haven’t policy makers adopted these market-based approaches, which economists have been advocating for three decades?” Wyman asked. Only 11 fish species, which represent 24 percent of the fish taken in federal waters, are regulated by ITQs. ■



NYU's Florence Campus Hosts Experts on Global Terrorism



NYU's sun-drenched La Pietra campus, with its fragrant lemon trees amid a peaceful Tuscan landscape, was a sometimes jarring backdrop for the somber discussions held during the Center on Law and Security's June conference, "Prosecuting Terrorism: The Global Challenge."

Karen J. Greenberg, executive director of the center, along with faculty co-directors Stephen Holmes and David Golove, pulled together prominent legal experts, law-enforcement officials and policymakers. The group included Judge Jean-Louis Bruguiere, the chief prosecutor for terrorism in France; Armando Spataro, one of the leading Italian prosecutors for terrorism; Ronald K. Noble, the secretary general of Interpol and a member of the Law School's faculty; Peter Clarke, the head of the antiterrorist branch at New Scotland Yard; Dov Lutsky, the commander of security for the Northern Galilee subdistrict of Israel; and a group of former national security advisers from the Bush and Clinton administrations, including Roger Cressey, Daniel Benjamin and Steven Simon.

The gathering discussed ways to remove the impediments to countering terrorism and the possibility of forming a multilateral body, and what those changes might mean for the Middle East. In the wake of the Madrid bombing on March 11, 2004, participants were eager to consider the merits of greater communication and more formalized methods of cooperation among nations. If one premise underlay the talks, it was that national security for any one nation no longer exists independently of international

security. "International cooperation is a priority not only in Europe but also with all the countries in the world," said Judge Bruguiere, "especially the United States."

The conference attendees have been involved in the war against terror—either by radical Islamists or on the part of national liberation groups—for decades. Behind the headlines, it is their work that

thwarts the terrorists on a daily basis. The general consensus of the gathering was that the terrorists remain strong; that the war in Iraq has greatly harmed the cause of counterterrorism globally by diverting resources, radicalizing a new recruitment base for Al Qaeda and enhancing anti-Americanism; and that the expectation of chemical warfare is real and growing, particularly in regions such as Chechnya.

The group agreed that bilateralism, which has been the trusted method of informational exchange among law-enforcement officials, is not enough to counter growing threats. Daniel Benjamin, now a senior fellow at the Center for Strategic and International Studies, recommended the creation of

panelists suggested using the incentive structure of the International Atomic Energy Commission as an example, perhaps by creating a fund to help developing nations with technical capabilities.

Other participants rejected the idea of a new organization; rather, they insisted that the legal mechanisms in place needed to be improved.

Meanwhile, the panelists said law-enforcement officials face the persistent and adapting strategies of terrorists on a daily basis. At each of the sessions, stories of missed arrests and miscommunications mingled with reports of daring escapades and novel captures. Much remains to be done, according to Bruguiere and others. Speaking of the challenges faced by Britain, Scotland Yard's Peter Clarke pointed out the changes that have taken place in capturing terrorists. "Irish terrorism was by and large domestic. Obviously we are now facing a global threat and in order to investigate it we have to operate globally... We are now looking at much looser networks," he said. "If we take one or two leaders out, they are very quickly replaced and the network is re-formed."

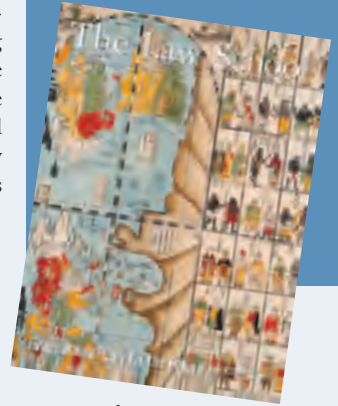
Across the board, participants expressed concern about the need for legal systems to adapt rapidly to the needs of law enforcement in counterterrorism. Suggestions included more detention time prior to formal charges, better coordination of data at the international level, expansion of the parameters around covert operations, and more creative methods of penetration into terrorism groups. "Of course, catching a suicide bomber alive is like a treasure for all those who try to understand terrorists' motives," said Israel's Dov Lutsky.

Despite the bleak subject matter, the meeting was an exercise in coming together to examine the problems faced by the global community. Amid the fear of brewing terrorist plots, the experts agreed that thwarting the enemy is possible, but that it takes conviction, a sense of reality, a genuine willingness to collaborate and a commitment to worldwide policing. "There are a lot of us thinking about this," said Greenberg in summing up. "Therefore we do have some chance of having a more stable world in the future." ■



Karen Greenberg, executive director of the Center on Law and Security, and Judge Jean-Louis Bruguiere, chief prosecutor for terrorism in France.

a multilateral counterterrorism organization that monitors terrorist activities such as money laundering and arms trafficking. It was also suggested that the organization provide incentives for membership in such a group, including economic support. Some



Faculty Focus



If the backbone of a law school is its faculty, then the strength of the NYU School of Law's spine is evident from the breadth and quality of its professors' scholarly work. We are pleased to excerpt and showcase five notable pieces that previously appeared in top journals. Good Reads, an index of all the books, articles, chapters and shorter works published by our faculty in the last year follows, along with reviews of some of those books. Also, scattered throughout the magazine, you'll find reprints of faculty-written op-ed pieces. In this section, in addition, we profile new professors joining the school, along with the 2004-2005 visiting, global and in-residence faculty, and fellows who will be joining for a term or more.

In his excerpted piece, *The Birth of an Academic Obsession*, Jacob D. Fuchsberg Professor of Law Barry Friedman, a leading federal courts scholar, unravels the historical

explanation for rampant liberal anxiety over judicial activism. Professor David Golove argues in *The New Confederatism* that the U.S. should not shy away from international engagement due to a mistaken belief that certain treaties are unconstitutional. His historical review of the Founders' intentions indicates our forebears didn't want to limit U.S. engagement with the rest of the world. George T. Lowy Professor of Law Marcel Kahan refutes the conventional wisdom regarding how to stave off unwanted corporate takeovers in *How I Learned to...Love the Pill*. An-Bryce Professor of Law Deborah Malamud delves into the nuances of New Deal policy in *Who They Are—Or Were: Middle Class Welfare in the Early New Deal*, to discover how personal biases play into the best-intentioned policymaking. Professor of Clinical Law Anthony Thompson analyzes the popular trend in law enforcement called

"community prosecution" and identifies a key impediment to its success in *It Takes A Community to Prosecute*.

Be sure to peruse the index too: Consider John Edward Sexton Professor of Law Richard Stewart's book, *Reconstructing Climate Policy: Beyond Kyoto*, written with Jonathan B. Wiener. Or Professor Noah Feldman's *After Jihad: America and the Struggle for Islamic Democracy*. We've also tucked Professor Linda Mills' *New York Newsday* op-ed about women and violence into the Good Reads section. She offered her considered opinion on human nature around the time that the shocking photos of U.S. troops abusing Iraqi prisoners were released. Giving voice to what so many were thinking, she asked: How could a woman commit this sort of violence? "Gender is irrelevant," Mills answered. "The truth is women can be as violent as men."

Academic Obsessions, Liberal Anxieties, and the Supreme Court

Barry Friedman traces the historical roots of society's discomfort with judicial review.



For at least a century, intellectual thought has embraced both popular (majoritarian) democracy and the protection of constitutional safeguards. But these two values seem to conflict in judicial review. To solve this scholars have tried to define democracy in a way that is less tied to majority rule, or insist that a precondition for democracy is that certain kinds of rights be respected. In this excerpt from "The Birth of an Academic Obsession: The History of the Counter-majoritarian Difficulty," published in the Yale Law Journal, Professor Barry Friedman, NYU's Jacob D. Fuchsberg Professor of Law and one of the country's leading constitutional theory and federal courts scholars, argues that the conflict between democracy and judicial review is more apparent than real. Tracing its roots to social conflict in the early 20th century, he says the concern over the "counter-majoritarian difficulty" is actually an academic obsession rather than a real problem. According to John Ferejohn, a visiting professor of law at NYU, Friedman reveals the "liberal anxiety about unelected courts thwarting democratic legislatures" to be false. That instead, "the Courts, no less than other political institutions, are accountable in various ways to public opinion, and that judicial disagreement with popular bodies or even judicial legislation is not inherently undemocratic." Indeed, adds Ferejohn, "Professor Friedman's article is important work: it shows that...there is no real problem of political justification at present."

In our system of government, judges have the power to strike down laws or executive actions found to be inconsistent with the Constitution. This power of "judicial review" frequently is controversial. Both its challengers and its defenders struggle to explain why unelected and ostensibly unaccountable judges should have such power in a democracy. In his famous work *The Least Dangerous Branch*, Alexander Bickel termed the problem of reconciling judicial review and democratic governance the "counter-majoritarian difficulty."

This article is part of a broader project designed to persuade scholars to consider judicial review in different terms. Although judicial power is different than other governmental power, it is not necessarily true that it is any less accountable. Many non-judicial government actors are not directly accountable to the people. More important, when rhetoric is put to one side it is clear that there are political constraints on the judiciary as well. The judiciary depends on the political branches to enforce its judgments, and politicians unhappy with judicial actions have the power to level attacks at the judiciary, including jurisdiction stripping, court packing, impeachment, and budget cutting. In short, the classic formulation of the counter-majoritarian problem lacks the nuance to make it an accurate statement of the relationship between judicial review and democratic governance in our society.

The point of this article is to demonstrate that the counter-majoritarian difficulty that obsesses the legal academy is not some timeless problem grounded in immutable truths. What everyone recalls about *The Least Dangerous Branch* is Bickel's stunning attack on the legitimacy of judicial review. Too easily forgotten is the fact that the book actually was a defense of judicial review, one especially attuned to the circumstances of the time in which Bickel wrote. Bickel was simply trying to justify a set of jurisprudential outcomes he favored personally, within the limits of the intellectual structure handed down to him by his teachers. The academic fixation with the counter-majoritarian problem represents—as it almost always has—a need to justify pre-

sent-day political preferences in light of an inherited intellectual tradition. Seen in that light, the academy ought to be able to free itself from the rhetorical grasp of the counter-majoritarian difficulty and devote itself to a constitutional theory that is less a response to immediate judicial decisions, captures more accurately the role judicial review actually plays in society, and is more enduring.

We often assume that the counter-majoritarian problem that obsesses constitutional theorists has been with us always, but that is not the case. It is true that judicial review has been criticized on and off since at least 1800 on the ground that it interferes with popular will. But it is important to distinguish a criticism that is leveled at courts in public debate on the occasions when circumstance seems to warrant it from the intellectual problem of justifying judicial review that has gripped the academy nonstop since the early 1940s. In truth, although the criticism of constitutional judges as unaccountable was leveled as early as 1800, it was not prevalent for the next roughly 100 years, largely because concepts of judicial supremacy were not extant through that period, and thus there was no particular problem of unaccountable judges trumping popular will. Political actors during the Jacksonian era defied the Supreme Court; during reconstruction they threatened its existence. In the early republic, there was not much of a counter-majoritarian problem.

It was only during the Populist-Progressive Era, at the turn of the 20th century, that the counter-majoritarian problem found full voice in public debates, but at that time it made abundant sense. First, there were instances in which the courts plainly attacked laws with wide majoritarian support, such as the invalidation of the income tax and the overturning of child labor legislation. At the least, these were measures that had made their way through legislative bodies, only to be struck down in relatively short order by the courts. Second, there was a democratic fervor sweeping the country at the time, and legislatures were deemed to be infinitely more responsive to the popular will than judges, who were seen as class-biased ideologues manning the barricades against what conservatives viewed as the mob. Add to this the realization that the Constitution was capacious enough for constitutional cases to come out either way—indeed, different judges often saw them quite differently—and it became perfectly sensible to express concern that often-unelected judges were trumping the will of the populace. No wonder that the period between 1890 and 1925 saw courts criticized as acting contrary to popular will more often than at any other time in history. During the Progressive Era, such "counter-



*"Do you ever have one of those days when every-
thing seems unconstitutional?"*

majoritarian criticism" captured accurately the problem with judicial review that progressives experienced.

By mid-century, however, the world looked quite different than it had during the Progressive Era, calling into question just how apt the earlier era's criticism really was. In contrast to the Progressive Era's judicial overruling of democratically-supported legislative actions, many saw mid-century as a time of legislative stasis and judicial intervention as a necessary force to solve the problems neglected elsewhere. Many of the Warren Court's projects had popular support. And popular support persisted despite widespread understanding that judges often "made" the law. Yet, despite the fact that, quite unlike the Progressive Era, popular opinion during the Warren Court did not see a difficulty with the role of judicial review, this is precisely when the present academic obsession with the countermajoritarian problem found full voice.

That academic fixation and popular opinion diverged is quite evident from a comparison of academic and popular reaction to two of the Warren Court's most noteworthy projects. The Supreme Court's reapportionment decisions in the 1960s met with great public support and approval, but the academic tradition discussed here criticized them specifically on the ground that it was inappropriate for judges to trump popular will. Conversely, by the time of the decision in *Miranda v. Arizona*, the Supreme Court's criminal procedure decisions were under broad popular attack on the grounds that they interfered with popular preferences, but scholars approved of those decisions.

The thesis of this article is that the countermajoritarian problem that came to grip the legal academy during the mid-20th century was a result of historical, professional, and intellectual forces that, as a cultural matter, simply were unavoidable for many academics (even though they seemed to matter little to those beyond the professoriate). History can help us to see this. The task here is to recreate the academic world in the mid-20th century, so we can see where the modern obsession with the countermajoritarian problem was born.

First, the formulation of the problem of judicial review as inconsistent with democracy was an inherited intellectual tradition that scholars at mid-century and today have found difficult to shake, even if it makes little sense. The countermajoritarian problem was framed by figures such as James Bradley Thayer, Learned Hand, Felix Frankfurter, and perhaps Oliver Wendell Holmes and Louis Brandeis as well. Their philosophy was formed in the Progressive Era, when it was appropriate. But as the Court changed hands and the world changed around them, some of these figures—Hand and Frankfurter, in particular—were unable or unwilling to make the turn to a new post-war understanding of judicial review. "Throughout the '20s and '30s, Frankfurter had decried the Court's strangulation of liberal social legislation.... Yet in the area of jurisprudence that was in fact to become the main preoccupation of the post-1937 Court—civil liberties and civil rights—Frankfurter was unprepared for what was to come." For Hand, the problem was so insoluble that he recommended extreme deference to legislative judgments just shy of judicial abdication. "I cannot frame any definition that will explain when the Court

will assume the role of a third legislative chamber and when it will limit its authority to keeping Congress and the states within their accredited authority."

The prominence of these individuals was such that leading academics viewed this line—from Thayer to Holmes to Hand to Frankfurter—as the tradition within which they had no choice but to work. In delivering the Cooley Lectures at the University of Michigan in 1969, Philip Kurland would happily identify himself as "one of those antediluvians from the University of Chicago who purportedly live entirely on the intellectual sustenance of Felix Frankfurter and Adam Smith." The Legal Process school "treated Frankfurter as the symbol of judicial restraint and the integrity of the legal process." "Felix Frankfurter's influence was felt at Harvard," explains William Wiecek, "long after he left for Washington." The names Holmes, Frankfurter, Hand (Frankfurter), Thayer (still more Frankfurter) fairly leap off the pages of Bickel's *The Least Dangerous Branch*. Martin Shapiro, hardly a sycophant of the Legal Process school, would explain in the preface to his path-breaking *Law and Politics in the Supreme Court*: "The one truly moving episode of my graduate education was hearing Learned Hand deliver the Holmes Lectures, and my thinking about the Supreme Court has been largely an attempt to grapple with the ideas of Hand, Justice Frankfurter, and Professor Wechsler."

Second, the countermajoritarian difficulty as we know it today is primarily a product of liberal anxiety at mid-century to reconcile what seemed to them an intractable tension in their own way of thinking. The countermajoritarian difficulty represents a deeply felt dilemma, unique to political liberals, one that became salient when for the first, and perhaps only, time in history the Supreme Court—under the leadership of Earl Warren,—took on a liberal cast. For much of its history (and particularly since the beginning of the 20th century) the Court's attackers have been liberal; the defenders, conservative. On those occasions when liberals attacked judges for interfering with popular will, conservative defenders responded that the role of courts was to serve as a check on democracy. When the tables turned in the 1950s and 1960s, however, liberals were hoisted on their own petard. How could they approve of the results of Warren Court decisions, while still retaining what they claimed was a longstanding commitment to democratic government and disapproval of judicial review as inconsistent with it? As another commentator observed, "[O]ne is struck by the irony that liberals and conservatives have today adopted views completely the reverse

of those each held in the constitutional crisis of the 1930s.”

The switch from a conservative Court focused on economic rights to a liberal Court with an individual rights agenda was easy enough for conservative critics of Warren Court decisions. After all, conservatives had always believed (or at least since it started to matter in the 1800s) that the Constitution, as interpreted by the Supreme Court, properly tempered the will of the mob. For the most part, conservatives simply could attack the Supreme Court’s decisions on the merits, not having to confront any particular tension with their earlier views about judicial review. In other words, without attacking the institution, they could still argue that its decisions were wrong as a matter of constitutional law.

But for academic liberals—those who approved the results of the Court’s decisions—the switch posed a deeper intellectual problem. Inevitably, judges “had to explain their acceptance of an essentially unlimited government in the economic domain, yet also...to allow them to enforce limits on government in the domain of civil rights and civil liberties.” It was natural for Progressive Era critics to criticize judicial review as undemocratic and leave it at that. Most of what the old Court was doing was unacceptable to them. But a Court that eschewed regulation of the economy and focused on equality and individual liberty, that was a different matter. It was more difficult for liberal scholars to consign that Court to a role of blind deference to majoritarian decision-making. It is precisely in this shift from a conservative to a liberal Court that much of the following generation of liberal legal scholars got caught.

Mid-century academics found it difficult to reconcile their approval of Warren Court judicial review with the paradigm of “democratic faith” that they had inherited. Even if the Court was doing things that might be “beneficial,” still, “doubts are rooted in the democratic faith, which holds that society at large ought to participate in the venture of governing itself.” The writings of liberals, Court critics and defenders alike, focused (one might say fixated) on this inherent tension of liberal democracy. In *The Least Dangerous Branch*, moving from supposed description to theory, Bickel observed, “Democratic government under law—the slogan pulls in two opposed directions...” And this tension was at the heart and frame of Robert McCloskey’s classic work (published in 1960) *The American Supreme Court*:

The bifurcation of the two values in the American mind impellingly suggested that the functions should be similarly separated. And the devotion of Americans to both popular sovereignty and fundamental law

insured public support for the institution that represented each of them. This dualism...helps account for a good deal that seems baffling in later history....

Many liberals seemed genuinely torn by this apparent choice between democratic principles and judicial results. Perhaps the most famous example of this was Herbert Wechsler’s public denunciation of *Brown v. Board of Education*, not only for failing to enunciate a neutral principle underlying the opinion, but also because Wechsler himself could not identify one. This, despite Wechsler’s personal belief that the decision and others like it “have the best chance of making an enduring contribution to the quality of our society of any that I know in recent years.” Thus, *Brown* stood “for one of my persuasion” as “stir[ring] the deepest conflict I experience in testing the thesis I propose.” Wechsler was hardly alone: Philip Kurland advanced withering attacks on the Court, all the while approving its role “to protect the individual against the Leviathan of government and to protect minorities against oppression by majorities.”

The problem for latter-day (as opposed to Progressive Era) liberals, of course, was that they professed belief both in the results of the Warren Court *and* in the democratic creed that formed the basis for attacking judicial review. Some of this was inherent in the work the Warren Court itself was doing; because “the Supreme Court under Warren...was under attack not for its lack of democracy, but for its democratic zeal,” the internal tension was inevitable. But even when the Court arguably was rendering countermajoritarian decisions, such as striking down laws restricting the rights of communists, liberals agreed with the results. In these cases, both halves of the liberal faith were put to the test: the long-standing progressive creed in noninterference with democratic legislative results, and the newfound liberal belief in individual liberty.

The third, and perhaps most poignant, reason for the obsessive hold that the countermajoritarian problem had on these liberal academics was their need to imagine a countermajoritarian Court, even if one did not exist. For a public that had seen the ugly face of totalitarianism during World War II and its aftermath, there was broad support for an institution in a democracy dedicated to protecting minority rights. The same was true among many academics. But in light of their progressive ancestry—which, recall, had threatened to discipline the Supreme Court by packing it during the New Deal—mid-century liberals lived with the anxiety that the public itself ultimately would turn on the Court and endanger a set of results these academics approved.

The promise of a Court protective of liberty was dear to them, but they were sure such an institution inevitably would run afoul of popular opinion and were skeptical that such an institution could exist or survive public disapproval. Thus, Alexander Bickel’s “countermajoritarian difficulty”—the problem of justifying judicial review in a democracy.

Ever since Franklin Roosevelt appointed enough justices to the Supreme Court to change its politics to the left of the political spectrum, liberal legal academics have struggled to justify judicial review. For them, the courts held the promise of equality and individual liberty, and the trick was to explain judicial review as the locus for those desired ends while maintaining fidelity to democratic values. Today, the courts seem the last place to look for liberalism, and academics have begun to engage in a new round of Supreme Court-bashing—oddly reminiscent of the Progressive Era—questioning, rather than justifying, the democratic pedigree of the judiciary. Perhaps now, as the worm turns yet again, it would be useful to step back and gain some perspective, to understand the historical context in which these arguments have been made before. Such perspective might even lead constitutional scholars to a new kind of constitutional theory. ■

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International Entanglements: Are They Illicit?

David Golove says no. He makes the case for the legality—and importance—of active engagement with the rest of the world.



Recently, some scholars have claimed that the principles of democracy that underlie the U.S. Constitution preclude the United States, even by treaty, from entering into agreements in which international institutions will govern rules for conduct of U.S. citizens. NYU Professor David Golove, the director of the J.D./LL.M Program in International Law, argues persuasively against such thinking in the following excerpt from his article, “**The New Confederalism: Treaty Delegations of Legislative, Executive, and Judicial Authority**,” published last year in *The Stanford Law Review*. Through his scholarship, notably “*Treaty-Making and the Nation: The Historical Foundations of the Nationalist Conception of the Treaty Power*,” (*Michigan Law Review*, 2000) and “*Is NAFTA Constitutional?*” (with Bruce Ackerman, *Harvard Law Review*, 1995), Golove has secured a reputation as one of the most original and promising scholars in constitutional law. Here, he shows that the Constitution’s drafters never meant to limit the United States’ ability to enter into international relationships. Commenting on the article, Richard H. Pildes, an NYU colleague and the Sudler Family Professor of Constitutional Law, praises Golove for engaging critical issues at the intersection of American constitutional law, foreign affairs, and international relations. “Professor Golove’s work reflects the view that serious grappling with the problems of our moment requires... understanding the ways in which present possibilities are shaped by past choices. No scholar brings more depth of knowledge and insight into the history of constitutional thought and experience.”

One of the most notable developments accompanying globalization has been the revitalization of the confederal form of governance—what I call the New Confederalism. This development is evidenced most dramatically by the European Union, but also by the World Trade Organization, the North American Free Trade Agreement, the International Criminal Court, and many other new international bodies. The immediate precedents for this development are the international organizations formed as part of the League of Nations and United Nations systems. But the idea of confederations actually goes back much further, to the ancient confederacies of the Greek city-states; the early modern Dutch, German, and Swiss confederacies; and the utopian schemes of Henry IV and the Abbé St. Pierre, which inspired both Jean Jacques Rousseau and Immanuel Kant.

These and related developments, and the future possibilities they auger, undoubtedly raise fundamental normative questions about the legitimacy of the emerging system of international governance. Most scholarly consideration given to these questions, at least in the United States, has tended to view them largely through an international lens, asking about the conditions of legitimacy for the exercise of authority by international institutions. But more recently, domestic constitutional law scholars have begun to ask similar questions, only from a different

perspective. Their concern is not with the conditions for the exercise of legitimate authority by international bodies, but with the consistency of exercises of international authority, whether legitimate or not, with the principles of national democracy rooted in the domestic Constitution. Putting aside the specific constitutional questions that different treaties raise, there is a common theme that runs throughout the burgeoning domestic constitutional literature: Is there a fundamental “postulate” implicit in the democratic structure created by the Constitution—call it the principle of exclusive national democracy—that prohibits the federal government from delegating any governmental authority over U.S. citizens to officials who are not accountable, directly or indirectly, *exclusively* to the American electorate? A growing body of U.S. constitutional law scholars seems to think so, and their views are, in this respect, reflective of a wider public concern about delegating U.S. “sovereignty” to international institutions. If these constitutional scholars are correct, then U.S. participation in any international regime involving the delegation of governmental authority is inherently constitutionally suspect. It should thus be evident that their approach would profoundly inhibit the ability of the United States to engage constructively in the developing globalization process.

I am deeply skeptical that there are any persuasive normative grounds for such a sweeping principle. The most persuasive normative underpinnings of democracy and of popular sovereignty seem to entail the opposite view. At least sometimes—on matters like global warming, for example—the inclusiveness of international decision-making on the confederal model may offer the only workable basis for realizing the positive values of equality and self-government that underpin the democratic ideal.

In any case, it is quite unclear, as a constitutional matter, where support for the exclusivist principle might be found. It certainly does not appear in terms in the constitutional text—on the contrary, there are strong textual grounds for reaching the opposite conclusion, though I will not rehearse the technical arguments here. Scholars who endorse the principle have, therefore, looked in some surprising places—for example, in the principles concerning domestic delegations of legislative, executive, and judicial authority and in the judicial doctrines arising out of the Appointments Clause. But these principles and doctrines are primarily concerned with the separation of powers among the branches of the federal government and, secondarily, with the larger principles of *domestic* democracy. As a result, they offer limited guidance on the questions raised by *international* delegations of author-

ity. The considerations that are relevant to structuring the forms of domestic democratic government can provide, at best, only a starting point in thinking about how to structure the relationships that the nation conducts with other sovereign states for the purpose of carrying out cooperative projects serving mutual interests and addressing common concerns.

The constitutional scholars who endorse the exclusivist principle seem to assume that it is somehow inherent in the idea of popular sovereignty, at least as that idea was embodied in the Constitution by the Founders in 1789. On the contrary, however, a serious examination of the founding of this country reveals the fallacy of this claim. The Founders were neither committed to the principle of exclusive national democracy nor did they believe that treaty-based delegations of governmental authority to international bodies comparable to those that characterize the New Confederation were constitutionally problematic.

The Founders were, in fact, quite familiar with the phenomenon of confederations. In the Articles of Confederation, they had created one and had lived under it for a number of years. Especially as they contemplated replacing the articles with a new constitution creating a genuine government, they developed a normative framework to explain when delegations of sovereign authority by ordinary treaty or compact were permissible and when they required the approval of the people acting in their original or constituent capacity, that is, by constitutional amendment.

Confederations—or leagues, as they were commonly called—were a well-known form with which the founding generation was widely familiar. Modern theorizing about confederations began with the breakdown of the universal institutions of the Middle Ages and the emergence of the modern nation-state and, especially, with the birth of the doctrine of absolute sovereignty in the writings of Jean Bodin and Thomas Hobbes. In this new context, the existing German, Dutch, and Swiss confederations appeared as anomalies, and writers on the law of nations, like Samuel Pufendorf, followed by political theorists like Charles-Louis Montesquieu and Jean Jacques Rousseau, struggled to develop an account of this phenomenon that was consistent with their fundamental theoretical premises. Confederations, they argued, were not cases of divided or shared sovereignty. Rather, they were leagues of independent and sovereign states formed by treaty, and their institutional embodiments were not governments but congresses or diets of diplomatic representatives. The very term “confederation” (or its then equivalent “federation”) was derived from the Latin term *foedus*, which means “treaty.”

It is not surprising, then, that Americans, versed in the received categories of the day, would understand their own confederation as based on a treaty or compact among “independent” and “sovereign” states, and the Confederate Congress as “a diplomatic assembly.” The express language of the Articles itself strongly encouraged this understanding. The states were, it proclaimed, entering into “a firm league of friendship with each other” in which “[e]ach state retains its sovereignty, freedom, and independence.” This understanding persisted, moreover, throughout the founding debates. At a number of pivotal moments, James Madison, for example, emphasized that the Articles were “nothing more than a treaty” and that the Confederation Congress was but “a league of sovereign powers” governed by the law of nations.

For present purposes, however, what is crucial is not simply the label attached to the confederation but the underlying understandings about the source of its legal validity. Was it the work of the state legislatures exercising ordinary treaty or legislative power or did it have the direct imprimatur of the people? Most state constitutions, in fact, said little or nothing about the confederation, and what is more, they typically contained provisions—not found in the U.S. Constitution—broadly proclaiming the principle of popular sovereignty in

plated receiving and, in fact, received only legislative ratifications. Indeed, it was only the failure of the Rhode Island legislature to ratify, in one instance, and of the New York legislature, in another, that blocked, under the unanimity rule of Article XIII of the Articles of Confederation, the adoption of major proposed amendments.

The precedent of legislative ratification of the Articles of Confederation, together with Article XIII’s unanimity rule, presented the Framers in Philadelphia with a serious dilemma. As a practical matter, there was little or no prospect that all 13 states would ratify the Constitution. It was this, in part, that led them to adopt Article VII, which provided that the Constitution would be effective upon the ratification of only nine states and which called for state ratifying conventions instead of state legislative approval. But it was not only *real politique* that led the Framers in this direction. At stake was also a matter of high principle: What was the proper method for establishing a constitution of government like that which they were proposing? Was legislative ratification by the states making up the new federation sufficient, as it had been for the Articles, or did the principle of popular sovereignty require a reference directly to the authority of the people?

As a practical matter, of course, the Framers’ answer to these questions was

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terms that might reasonably be construed as inconsistent with any such delegation. It is striking, then, that the state legislatures uniformly approved the Articles of Confederation without obtaining any further authority from the people. Except in a few states that gave constitutional sanction to the confederation, the validity of the Articles rested solely on legislative authorization. And it is equally striking that on the numerous occasions when Congress proposed amendments significantly extending the powers of the confederation—to give it the power to impose and impost, for example—it contem-

Article VII. Among the delegates in Philadelphia, however, there was by no means unanimous agreement that legislative ratification was insufficient, and some delegates who supported state conventions were apparently swayed not by any perceived necessity in principle for referring the matter to the people but on purely pragmatic grounds. Still, for many, there was a point of fundamental principle involved. As Madison explained, it was improper to provide for mere legislative ratification of the Constitution because “the Legislatures were incompetent to the proposed changes.” The Constitution, if



adopted, “would make essential inroads on the State Constitutions, and it would be a novel and dangerous doctrine that a Legislature could change the constitution under which it held its existence.”

Madison did not specify the respects in which the Constitution would make “essential inroads” on the state constitutions. Nevertheless, his thinking is fairly clear. Legislative ratification of the Articles as a treaty or league had not involved the “novel and dangerous doctrine” that a legislature could change its own constitution. After all, how could the doctrine be “novel” if the validity of the confederation itself depended on it? In contrast, the proposed constitution crossed the line that separates a league or treaty, within legislative competence, from a genuine “Political Constitution,” creating a government, which requires approval directly by the people. The Constitution simply involved too great a delegation of authority, in terms of both the extent of federal jurisdiction granted and the mode in which it was to operate, to be properly ratified as a league. By delegating so much authority, and thereby substantially diminishing their own authority, the state legislatures would be making “essential inroads” on their own constitutions. Nor was Madison alone in holding the view that legislative ratification of a league was proper. Patrick Henry, for example, went so far as to insist that “the people have no right to enter into leagues, alliances, or confederations... States and sovereign powers are the only proper agents for this kind of Government.”

What, then, was the difference, in the founding view, between a “league” or

“treaty” and a “national” government?

No single criterion, nor even a single set of criteria, were agreed on. Madison, however, noted five that had been frequently asserted in the course of the founding debates: Leagues and governments differed, he noted, first, in the *foundation* of their authority—whether in the consent of *states*, on the league model, or the consent of *individuals*, on the national government model; second, they differed in the nature of their systems of *representation*—whether representatives were appointed by the states on the principle of state equality, or were elected by the people on the basis of proportionate representation; third, they differed in the *operation* of the government—whether on the members in their collective capacities or directly on individuals; fourth, they differed in the *substantive scope* of their powers; and, fifth, they differed in regard to the authority by which *amendments* could be made. Even these distinctions, however, were not understood as affording inflexible rules. Federalists pointed out, rather, that both the historical practice of actual confederations and the theoretical accounts of the form simply could not be reduced to any rigid set of formal criteria. This was nowhere more true than in regard to the Articles of Confederation themselves, which, in fact, had many mixed characteristics and, yet, uncontroversially retained its character as a confederation. It was therefore impossible to draw any bright lines. The Constitution would transform the nature of the federal polity not because there was anything entirely novel in it from a purely formal point of view, but because the import of the various changes taken as whole created a genuine “government” out of a system that before had been

genuinely confederal. As a result, while it was perfectly consistent with constitutional principle for the Articles of Confederation to have been approved solely by the state legislatures, the Constitution could only be approved by the people themselves.

This understanding of the founding was confirmed by leading constitutional authorities during the great debates, provoked by the North/South divide, over the location of sovereignty in the U.S. constitutional system. Chief Justice John Marshall, for example, explicitly affirmed in *McCulloch v. Maryland*, that “To the formation of a league, such as was the confederation, the State governments were certainly competent.” Whereas, in contrast, when “it was deemed necessary to change this alliance into an effective government, possessing great and sovereign powers, and acting directly on the people, the necessity of referring it to the people, and of deriving its powers directly from them, was felt and acknowledged by all.” It adds weight to this view that it was shared by John Calhoun, the most profound constitutional theorist of the states’ rights school. The powers “of the confederacy,” he wrote, “were derived from the governments of the several States. It was their work throughout; and their powers were fully competent to it.” But the Constitution was an entirely different matter. “[T]he governments of the several States were wholly deficient in the requisite power to form a constitution and government in their stead. That could only be done by the people.”

It is also noteworthy that the confederation established by the Articles was not the only confederation that arose during the period leading to the Constitution. It is highly revealing that U.S. diplomats felt perfectly comfortable initiating and promoting the idea of a limited treaty of confederation between the United States and friendly European powers and that, when the idea was brought to the attention of Congress, it was widely viewed as a sensible proposal, raising no constitutional concerns.

The immediate spur to action were the attacks on commercial shipping in the Mediterranean by the so-called Barbary pirates. In response, Thomas Jefferson, then on diplomatic duties in France, boldly proposed a formal concert of European powers. For this purpose, he developed a draft confederation of states, the purpose of which was to combine the naval forces of interested nations to confront the Barbary threat. The proposal, which he explicitly called a “confederation,” is strikingly modern in conception, a kind of incipient international anti-terrorism organization. It called on all participating states to contribute forces in accordance with agreed-on quotas, and created a “council” whose function was to carry the confederacy

into effect. States would be represented in the council by their diplomatic representatives, voting would be computed in proportion to the quota of each state, and the majority, so computed, was to prevail on all questions within the scope of the confederacy. Moreover, the council would have the power to appoint officers to carry out the functions of the confederacy, including serving on board member state vessels.

No one appears to have objected to the plan on constitutional grounds, and, indeed, Congress was apparently favorably disposed to idea of a confederacy. It came to nought only because the Confederate Congress was, by that time—on the eve of the Philadelphia Convention—virtually bankrupt and barely able even to maintain the forms of its institutional existence. That Jefferson conceived of such a plan is certainly strong evidence that there was no inherent clash between treaty-based delegations of governmental power and the founding generation's conception of popular sovereignty or of fundamental constitutional principle.

Before concluding, it is worthwhile to consider one objection to the understanding of this history that I have offered. I call this objection the non-self-execution interpretation of the founding. Under this view, the crucial difference, in the minds of the Founders, between a confederation, subject

I have already noted that the Founders did not believe that there was a single criterion that defined the difference between a league and a government, and, moreover, there was, in fact, considerable contemporaneous support for the claim that the resolutions of the Articles of Confederation itself were at least sometimes self-executing. It is true, however, that there were many who did emphasize that one typical difference between a confederation and a government was that a confederation regulates the member states in their collective capacities but not, or at least not directly, the individuals of which each member state is composed. Even this claim had to be qualified, however, because in numerous respects, the Articles of Confederation gave Congress the power directly to regulate individuals. In any case, it is a mistake to think that this distinction corresponds to the distinction between self-executing and non-self-executing regulations. Rather, what was crucial in the minds of those who emphasized this point was that a confederation did not have the legal capacity to enforce its own laws through its own magistracy—most importantly, through its own executive officials and courts—and that it was therefore reliant on the cooperation and forbearance of the member states, which could effectively block implementation of confederate regulations if they so chose. Indeed, at

There is nothing inconsistent, then, between the confederate form and the principle of self-execution in U.S. constitutional law. A self-executing confederation falls well within the treaty-making power of the United States, at least as a treaty power was understood by the Founders.

to approval as an ordinary treaty, and a government, which requires constitutional approval, is that the regulations of a confederation are, in contemporary parlance, non-self-executing. That means that the resolutions of the confederate body do not have effect as law within the member states until implemented by each member state separately through an act of its own legislature. In contrast, the resolutions of a genuine government, whether it be styled a “national” or “federal” government, are directly enforceable by courts without the need for any further legislative implementation in the member states.

one point, Alexander Hamilton declared that it was this which “may be considered as forming the characteristic difference between a league and a government.”

It should be clear that self-execution, at least as it is understood in U.S. law, is in no way inconsistent with this conception of the confederate form. Even when a treaty obligation, or a regulation of an international organization, is self-executing, Congress remains entirely free to block its implementation by the simple act of adopting an inconsistent statute. Domestic courts will then give effect to Congress' later-in-time statute, not the international obligation. Thus, in order

to obtain compliance with their lawful decisions, international officials will remain entirely reliant on the good faith cooperation of the U.S. government. There is nothing inconsistent, then, between the confederate form and the principle of self-execution in U.S. constitutional law. A self-executing confederation falls well within the treaty-making power of the United States, at least as a treaty power was understood by the Founders.

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I do not believe that this early history provides a full answer to the constitutional challenges that have been raised in response to delegations of governmental authority to contemporary international organizations. At a minimum, however, it does dispel any extant myth that the Founders were somehow inveterately hostile even to confederate arrangements involving far more extensive delegations than have thus far been seriously proposed on the international plane. The Founders simply did not embrace the principle of exclusive national democracy. There is therefore a heavy burden of justification on those who would engraft that principle onto the contemporary Constitution.

The early history also has a more affirmative significance. The experience of the confederation period reflects an early recognition in our constitutional tradition of the need for a pragmatic approach toward the structuring of institutional arrangements among “independent” and “sovereign” states, and it provides a vivid illustration of the imperative reasons for adopting that approach. Although painfully aware of the costs to be paid in terms of democratic accountability and autonomy, the founding generation nevertheless recognized that imperative considerations of principle and interest could justify the legislative decision to confederate, in their case in order to win independence from the world's dominant power. Although in the 200-plus years since then, the context has changed immeasurably, but we too face similar choices. In order to obtain the benefits of economic growth through free trade, international peace and security through collective security and verifiable arms control and non-proliferation regimes, and environmental protection through international cooperative mechanisms, to name but a few, we must also make painful trade-offs in terms of democratic accountability and autonomy. Nothing in our constitutional law does, or ought, rigidly to constrain us from making the same kinds of pragmatic compromises that the founding generation was itself willing to embrace. ■

The Truth Emerges About (Corporate) Toxicity

Marcel Kahan questions the conventional wisdom about the efficacy of so-called poison pills.



The following essay was drawn from “How I Learned to Stop Worrying and Love the Pill: Adaptive Responses to Takeover Law” by Professor Marcel Kahan, George T. Lowy Professor of Law, and Edward Rock, Saul A. Fox Distinguished Professor of Business Law at the University of Pennsylvania, and published in *The University of Chicago Law Review*. Kahan’s courses and award-winning research—including “Do Bondholders Lose from Junk Bond Covenant Changes?” (with Bruce Tuckman), which won the Merton Miller Prize for the best paper submitted to the *Journal of Business*—focus on corporate governance, securities fraud and bondholder rights. In this essay, Kahan makes a convincing case that pills are not that poisonous. Kahan’s colleague, Robert Daines, until recently a professor at the NYU School of Law, and now the Pritzker Professor of Law and Business at Stanford’s law school, focuses on corporate finance issues in his scholarship too. Daines says “How I Learned to Stop Worrying and Love the Pill is the first article to examine and emphasize investors’ responses that might neutralize or counteract the pill, thus unsettling the comfortable conventional wisdom about pills and throwing open the policy options.” Professor Kahan’s contributions, Daines adds, “are rare and valuable partly because he has not only an excellent theoretical background, but good empirical skills as well.”

Twenty years ago, a wave of hostile takeovers burst on the scene. In response, target managers took resort to a variety of exotic sounding defensive tactics, ranging from “shark repellants” to “greenmail” and from “white knights” to the “Pacman” defense. Quickly, however, a new weapon in the defensive arsenal—the “poison pill”—rendered most other defenses moot. Compared to other defenses, the poison pill had several important advantages for target managers. A pill could be adopted by any company at any time without shareholder approval; adoption of a pill did not entail significant transaction costs and did not, apart from its effect on takeovers, affect the conduct of the company’s business; and, most importantly, a pill makes a company takeover-proof unless it is redeemed by the target board. The pill, in short, or so it was thought, enabled target managers to “just say no” to an unwelcome bid.

During this period, prominent commentators painted the world in which a “just say no” defense was valid in dark colors. They accused courts of “shirking their responsibility to safeguard shareholder value” and of sanctioning “corporate treason.” On the flip side of the coin, when a ruling by the Delaware Chancery Court appeared to reject the “just say no” defense, Martin Lipton (’55) of Wachtell, Lipton, Rosen & Katz sent a notorious memorandum to his clients characterizing the ruling as a “dagger aimed at the hearts of all Delaware corporations” and advising them that they may have to consider reincorporating in a different state. Beleaguered target managers, thus, must have breathed a collective sigh of relief when the Delaware Supreme Court in *Paramount Communications, Inc. v. Time, Inc. (Time-Warner)* issued an opinion that was widely read as endorsing the “just say no” defense.

Although it seemed, at the time, that the issues facing the Delaware courts—whether a poison pill was legal; whether managers could “just say no”—had decisive importance, somehow, in retrospect, they do not seem to have mattered quite so much. None of the parade of horrors predicted by the partisans came to pass. While merger and acquisition activity declined sharply around the time of the *Time-Warner* decision, it resumed as the economy rebounded. In the millennial year 2000, it reached a volume of \$1.3 trillion on more than 10,000 deals, thus

topping activity in 1988 by more than 400 percent in dollar terms and by more than 300 percent in the number of deals. Hostile bids continued to be made. Responding to the “just say no” defense, such bids were often accompanied by the threat of a proxy contest to replace the incumbent board. Moreover, the line between “friendly bids” and “hostile bids” became blurred. Unlike in the 1980s, in the latter part of the 1990s hostile bids and friendly bids were made by similar companies, were financed in similar ways, were made for similar reasons, and the bidders were represented by similar law firms and investment banks. Studying takeover activity, a prominent finance professor concluded that the hostility in takeovers is mostly “in the eyes of the beholder” and that the different types of bids made reflect tenuous distinctions in negotiating strategies and in the timing of the disclosure of takeover talks.

What is one to make of this? What is the relationship between legal doctrine and the world of takeovers? Our conclusion is that the role of courts is far less central than the partisans in the takeover debate assumed. Even the most important of the Delaware Supreme Court decisions turned out, in retrospect, to be little more than a small piece of an overarching re-equilibrating mechanism that adjusts to perturbations.

Assume, *arguendo*, that many market participants disapproved of the takeover standards set by the Delaware courts. There are three strategies that market participants could pursue. First, they could seek to change the law. Most importantly, market participants could seek legislative action. They could lobby the Delaware legislature to pass a law changing the takeover standards set by courts; they could lobby Congress; or, in some cases, they could urge the Securities and Exchange Commission to pre-empt Delaware law with federal regulations. Alternatively, market participants could try to modify the law through the common law process, by having Delaware courts overturn, limit, or modify their prior decisions.

Second, market participants could induce individual companies to reincorporate or change their governance structure through charter or bylaw amendments. For companies that are already public, reincorporations and charter amendments require the approval by both shareholders and directors, while bylaw amendments typically require the consent of either the board or shareholders. For companies that go public, the board typically determines the content of the initial public offering (IPO) charter and bylaws, taking into account the effect of these provisions on the IPO share price.

Third, market participants could seek to modify the corporate governance and managerial incentive structure in other ways.

The various elements of the governance and incentive structure interact with each other, often in complex ways. A change in the legal standard or an exogenous shock (such as an increase in the risk of hostile takeovers) can upset the balance between a legal standard and the other elements of the incentive structure. One way to re-establish the balance is to modify the other elements to create a new equilibrium. Adaptive devices that rebalance the governance and incentive structure can take multiple forms, including changes in the compensation regime, changes in board composition, changes in the shareholder composition, or changes in the capital structure. Depending on the device, adoption may require formal approval by the board and/or shareholders, approval by outside directors, actions by corporate officers, or actions by a subgroup of shareholders.

In drawing a distinction between legal change, opting out, and adaptive devices, we are trying to draw attention to different modes of response. Legal change requires action by the legislature, a regulatory agency, or the courts. Opting out requires private action, but in a formal, state-created, regulatory framework. By contrast, adaptive devices can take a variety of forms, many of which are more graduated and less formal than legal change and opt-outs.

How does one choose among strategies for responding to change or, for that matter, decide whether to respond at all? Broadly speaking, from the perspective of a group of dissatisfied market participants, strategies differ along two dimensions: their effectiveness in rectifying a problem and the ease with which they can be implemented. For legislative reversal, dissatisfied market participants must possess the political power to get a new law enacted. This may be the case when there is a broad consensus among market participants how the present law could be improved. Most amendments to the corporate code in Delaware are the product of such a consensus. Legislative reversal may also occur when one interest group or a coalition of groups captures the political process. Some commentators interpret the anti-takeover statutes passed by several states, albeit generally not the one passed by Delaware, as resulting from the capture of the legislative process by a few large local employers, possibly in coalition with employee representatives.

Opt-outs, in turn, have two potential advantages over legal change. First, opt-outs may be easier to implement. Opt-outs require either the governance powers to obtain board or shareholder approval for an opt-out by an existing public company or the pricing powers to induce managers to opt out when they take a company public, rather than the political power to induce legislative change. Thus,

as a result of either shareholder pressure or directorial judgment, many Pennsylvania companies opted out of the state's anti-takeover regime, which was enacted to protect a politically powerful local employer. Second, opt-outs may be more effective if firms are heterogeneous and the desired rule varies from company to company.

Adaptive devices, as well, may be pursued either because they are easier to implement or because they are more effective. Adaptive devices may be easier to implement because the requisite action necessary for adoption does not require formal legislative, board, or shareholder approval. Adoption may also be easier for other reasons: for example, because the device is less visible and therefore generates less opposition (compare informal pressure to redeem a poison pill with a formal bylaw amendment requiring redemption); because its effect is more ambiguous or less well understood (an employee stock ownership plan can serve as an anti-takeover device or as a bona fide benefits plan); because it has a greater claim to legitimacy (it is hard to oppose more independent directors); or because it utilizes carrots rather than sticks (contrast the incentives from executive compensation with the incentives from the threat of legal liability). Setting aside ease of implementation, an adaptive device can enable parties to achieve their goals more effectively than legislative change or opting out by offering more flexibility and fine-tuning (compare a board composed by more independent directors who would use a takeover

defense to further shareholder interests with a flat-out prohibition of takeover defenses). More generally, because adaptive devices come in many forms, with different approval requirements and different economic effects, they greatly increase the flexibility of market participants.

How, then, do the last 20 years of mergers and acquisitions relate to this framework? In the 1980s, an exogenous shock hit the corporate law system: In the space of a few years, hostile takeovers became commonplace and engendered changes in Delaware's takeover jurisprudence. How did the corporate world respond—and not respond—to these developments?

First, Delaware did not change its statutory law significantly, for example, by passing a law on whether and when a board may employ a poison pill. Delaware's principal legislative effort—the adoption of its moderate anti-takeover law, codified as Section 203 of the Delaware General Corporation Law, in 1988—was largely moot by the time it was enacted. It appears that there was no sufficiently broad political consensus that Delaware takeover law was wrong or, if wrong, how it should be changed.

Second, and strikingly for many critics of Delaware's approach, market participants did not induce many companies to opt out of Delaware law through charter provisions. Such charter provisions could have, as recommended by commentators, either restricted poison pills directly or made them ineffective by ensuring that shareholders



"Miss Kessler is our poison pill here at Tolan, Merle & Fender."

could replace directors in between annual meetings. With already public companies, one might argue that such opting-out did not happen because Delaware law requires board approval (in addition to shareholder approval) to amend the charter. Managers opposed to such amendments may thus have been able to prevent their passage. In other instances, however—most notably in response to Pennsylvania’s anti-takeover law—the board’s power to block charter amendments did not prevent massive opt-outs. In any case, the requirement of board approval does not explain why takeover-facilitating provisions were not included in the charters of companies that go public, when pre-IPO owners have incentives to adopt governance provisions that maximize the price at which they can sell shares to the public. To the contrary, to the extent that IPO charters contain special provisions, they inhibit hostile takeovers. The failure by the vast majority of companies to opt out to make Delaware law more takeover enhancing, whether by charter amendments or in an IPO, suggests at a minimum that market participants regard the board’s ability to “just say no” (unlike, for example, Pennsylvania’s law) as not seriously detracting from company value, and possibly as enhancing it.

Rather than by changing the law or opting out of it, market participants principally adjusted to Delaware takeover law through adaptive devices. As noted earlier, we find

tenure is less secure independent of any takeover bid. As a result, a CEO has less to gain by fighting to stay on. Better, a CEO may reason, for one’s pocketbook and reputation to depart with the rich send-off of a sale than run the risk of being fired ignominiously by a restive board.

There is substantial evidence that these devices were effective in neutralizing managerial opposition to unsolicited bids. Most importantly, the high level of merger and acquisition (M&A) activity indicates that there are no significant barriers to deals. And poison pills are mostly used by target boards to buy time, and bargaining power, in order to negotiate a higher price with the raider or to find a white knight, rather than to “just say no.”

Our framework suggests that there are two plausible explanations for the failure to pursue seriously a strategy seeking opt-outs or legislative change in response to the takeover standard developed by Delaware. First, the ultimate complex takeover regime—combining the power of the board to block a bid (and to threaten to block a bid to extract a higher price), financial incentives for target managers to accept one, and oversight by outside directors with increased substantive independence—may indeed reflect an equilibrium that is superior to the one that could be achieved by opt-outs or by legal change establishing a blunt “let shareholders decide” regime. Shareholders, in other words, may have learned to love

embraced the pill. What shareholders could do, however, they did do: They largely prevented the passage of new takeover-inhibiting charter amendments, and if a precatory resolution to redeem a pill is on the ballot, they voted for it. Beyond that, shareholders had to compromise with managers, offering them huge piles of money to buy off their opposition to unsolicited bids and subjecting them merely to the less-threatening discipline of independent directors rather than to the less-forgiving takeover market. Shareholders then do not love the pill, but they have learned to live with the pill. We will refer to this explanation as the “implementability hypothesis.”

What is most striking about the recent history of takeovers is that, *regardless* of which hypothesis is correct, the use of adaptive devices seems to work reasonably well for the participants. The level of M&A activity, the percentage of friendly-versus-hostile deals, the decline in efforts to adopt “show-stopping” charter amendments like dual-class recapitalizations, and the failure of states offering extreme anti-takeover measures such as dead-hand pills to attract incorporations all suggest that the intensity of managerial insecurity has been tempered and, with it, managers’ opposition to selling the company.

For buyers, the current state seems satisfactory: payments owed managers under incentive compensation contracts can be budgeted into the price; the amounts, while large for CEOs, are of the same order of magnitude as investment banking fees and amount to a relatively small percentage of the deal price; and market participants generally assert that deals that make economic sense get done. For target shareholders, the current state likewise seems satisfactory: managers have largely adopted “shareholder value maximization” as their mantra; M&A activity soared in the 1990s; and target shareholders earn significant premia in friendly deals. Finally, the current state suits most potential target managers: they stand to get rich on their options, and their “golden parachute” packages should they be made superfluous by an acquisition.

Overall, political controversy over takeovers has died down and the more hyperbolic claims by the partisans—that permitting a board to block a bid amounts to “corporate treason” or that preventing the board from blocking a bid constitutes “a dagger aimed at the hearts” of corporations—have vanished from the public debate. In other words, the system regulating takeovers as a whole, unlike many other aspects of today’s corporate governance structure, is in equilibrium with no substantial pressure for radical change. ■

In the 1980s, an exogenous shock hit the corporate law system: In the space of a few years, hostile takeovers became commonplace and engendered changes in Delaware’s takeover jurisprudence. How did the corporate world respond—and not respond—to these developments?

much higher magnitudes of stock options granted to executives, with features such as accelerated vesting upon a change of control. Such compensation devices provide substantial incentives to managers to accept an unsolicited takeover bid. In addition, outside directors play an increasing role in the governance of public corporations. For the most part, these outside directors are not mere lackeys of management. They may refuse to go along with a chief executive officer’s decision to reject an unsolicited offer. Moreover, their greater power means that a CEO’s

the pill. According to this explanation, occasional shareholder pressure to remove pills is concentrated in the companies that failed to adopt effective adaptive devices. We will refer to this explanation as the “effectiveness hypothesis.”

Alternatively, shareholders may have lacked both the political power to change the law and the governance power to achieve opt-outs. According to this explanation, shareholders exert only half-hearted pressure to remove pills because they realize the futility of that strategy, not because they

Middle-Class Welfare During the Depression

Deborah Malamud reveals that the New Deal didn't offer everyone the same deal.



An-Bryce Professor Deborah Malamud's article, "Who They Are—Or Were: Middle-Class Welfare in the Early New Deal," excerpted here from The University of Pennsylvania Law Review, helps us understand how the depression prompted well-meaning government officials to create systems of welfare for middle-class workers. These officials were concerned about how formerly prosperous and self-sustaining people would handle sudden unemployment. They worried that large numbers of newly unemployed workers might pose a danger to national stability. Says Sarah Barringer Gordon, a widely recognized scholar on the role of religion in American public life and the separation of church and state, and a Professor of Law and History at The University of Pennsylvania Law School, "The importance of Professor Malamud's new work lies not only in its contribution to our understanding of the depression and its effects on workers, it also helps us rethink how laws play into, and are themselves manipulated by, individual actors and government agencies." Gordon, who is currently working on a new book about religion and litigation in the twentieth century, The Spirit of the Law, adds; "Professor Malamud is a careful and thoughtful researcher and writer. She is innovative, but she backs up her insights with attention to the real world. This is a rare and extremely valuable combination of commitments."

A t numerous points in modern American history, actors within the legal system have been required by their programmatic interests to develop a working understanding of middle-classness. The New Deal is a particularly fertile ground for the study of the middle classes and the law. During the New Deal, Congress adopted numerous social programs that put government actors in the position to make vital decisions about what it means to be middle class. Just as David Roediger has documented "the wages of whiteness" in America—the societal value of whiteness and how it was fought for and won—I aim to show how the crafters and administrators of New Deal social programs had, and took, the opportunity to define the "wages" of middle-classness. The central question is how key governmental actors decided what middle-class status was worth, not merely in terms of money (though, of course, money was crucial to all concerned), but also—and most importantly—in terms of dignity and honor.

In deciding who needed or was entitled to receive the benefit of these federal programs, administrators focused on the similarities and differences between different kinds of jobs or between the types of people who hold them. Most often, the administrators' discourse and practice turned on the distinction between blue-collar and white-collar

employment and its relevance, or lack thereof, to the program in question. If there had been, in the period, a clear societal consensus that the color of one's collar was the key marker of one's social class, the governmental focus on the collar-color line would be relatively uninteresting. But no such consensus existed. During the early and mid-1930s, lower-paid white-collar workers and higher-paid, skilled blue-collar workers were each engaged in battles (not necessarily with each other, a point to which I will return in closing) over their status and their class alliances. Through their public statements and official actions, administrators validated some groups' self-perceptions and belittled others'. In doing so, administrators made two significant interventions into the social process of defining the American middle class. They placed the Roosevelt Administration's imprimatur on a vision of the American middle class in which white-collar work was the most salient determinant of middle-class status. And they helped to ensure that both middle-class values, as they understood them, and the hierarchy that valorized those values would survive the downward-leveling threat of the Great Depression.

The problem of unemployment loomed large during the Depression. Already-poor black agricultural workers, unskilled blue-collar workers, skilled blue-collar workers, and white-collar workers at all levels faced dire economic conditions: unemployment followed by the eventual exhaustion of their economic resources, if they were fortunate enough to have had any, and then by poverty. Their economic needs presented the government with the question of whether distinctions based on past (for the impoverished unemployed) or present (if past status survived unemployment) social and economic status should be the basis for differential treatment in the delivery of unemployment relief. The key program for these purposes is the unemployment relief program administered by the Federal Emergency Relief Administration (FERA) and its successor agencies, all of which were under the authority of the legendary Harry Hopkins.

When Harry Hopkins joined President Franklin Delano Roosevelt's administration as head of FERA, he was no stranger to the problem of white-collar unemployment. As New York's administrator of relief, he helped pioneer the governmental development of work relief for the employable unemployed. While working together in New York, Hopkins and then-Governor Roosevelt had both been horrified by the demoralization caused by traditional indoor (poor house) and outdoor (mostly in-kind grants of commodities, e.g., food and coal) relief methods, and developed a preference for work relief. That

work relief was significantly more expensive than direct relief because of the cost of materials, supervision, and administration was an accepted fact at that time. Moreover, it was not the social value of the product that was its main selling point. Rather, the value was the moral value of work to the workers themselves. Hopkins developed the theory that white-collar workers (all white-collar workers, regardless of their previous levels of income) had an especially great need to have relief tailored to their special needs. They, more than other unemployed workers, needed to be provided work relief instead of direct relief; they, more than other unemployed workers, needed to be protected from the indignities of the welfare system, both for their own sakes and for the sake of the country's future. For them, to adopt the vocabulary of debates raging in our day, equal treatment required special treatment.

The archival record suggests that Hopkins and his staff recognized that the special dignitary status of white-collar workers was not universally accepted within American society. Indeed, FERA administrators made efforts to mask the favored treatment of white-collar workers from public view. They feared that the objections of organized, skilled blue-collar workers would, if these privileges were disclosed, lead to their undoing. This was not simply a matter of normal interest-group politics, of handing out the spoils and then hiding the act behind smoke and mirrors. White-collar workers, especially those not in the professions, were essentially unorganized in the early 1930s. Furthermore, in normal politics, all groups' claims are equally legitimate, but inevitably some groups win and some groups lose. In contrast, we will see that the (often unstated) claims of white-collar workers were seen by FERA officials as legitimate; the anticipated objections and claims of skilled blue-collar workers

were not. The specialness of the white-collar worker was, for them, simply obvious.

Before we examine the Hopkins administration's treatment of white-collar workers more closely, it is useful to establish a basic chronology of the activities of FERA and related agencies in the early years of the New Deal. While we are dealing here with different agencies, there is great continuity over time: Hopkins was always at the helm, and his long-serving core administrative staff was allocated to different positions as needs developed. We are dealing with the same minds directed toward the same basic task.

The First FERA Period (May–November 1933): FERA was created by statute on May 12, 1933, and Harry Hopkins was appointed to head the new agency on May 20. FERA funded and had an administrative hand in both direct and work relief, but work relief was Hopkins's greatest area of personal concern. From the very beginning, FERA began to solicit work-relief projects from the states and approve them for federal funding. Applicants for relief would apply to local relief offices (under state jurisdiction) with authority to dispense FERA assistance, and office staff would determine their eligibility for relief and establish, based on questioning and home investigation, a relief "budget" for each household—a total amount of aid needed "to prevent physical suffering and to maintain minimum living standards." It was then up to the relief office to determine whether the applicant would receive aid (up to but not necessarily reaching budget levels, depending on the office's funding level) in the form of direct relief or work relief. Work-relief jobs were not "real" jobs. The jobs were not full time, they paid less than the hourly rates for similar work in the "real" job market, and they were temporary: They ended when the project ended, or even sooner if

the recipient was found to be no longer in need (perhaps because someone else in the household had secured a "real" job).

The CWA Period (November 1933–May 1934): As the winter of 1933 approached, Hopkins persuaded FDR that it was time to try a new approach to work relief. FDR created the Civil Works Administration (CWA) by executive order on November 9, 1933. The declared mission of the CWA was to create "regular work"—real jobs, not on a work-relief basis—for four million of the unemployed. CWA wages were considerably higher than FERA work-relief wages. Half of these jobs were to go to individuals on relief as of November 1933; half were to go to individuals who were unemployed but not on relief. To get one of the two-million non-relief jobs, a person merely needed to show that he or she was unemployed. There was to be no investigation of an individual's economic need (for example, to make sure assets had been spent down) and no investigation of whether other members of the family were working.

Additionally, during the CWA period, Hopkins and his staff initiated a separate program, the Civil Works Service (CWS), which was specifically aimed at generating more jobs for white-collar workers than the states were otherwise willing to generate under the CWA program. For technical reasons relating to the funding source for these jobs, all required the job recipient to be on relief.

The CWA was enormously popular with large segments of the American public, and Hopkins was deeply committed to it. But it was expensive, and ultimately CWA (and CWS) lost FDR's support.

The Second FERA Period (April 1934–May 1935): With the return of FERA, work-relief jobs were to go exclusively to relief clients. The transition from CWA to FERA created a need to determine the relief eligibility of millions of workers in the shortest possible time. Applicants were required to prove both their own indigency and the unavailability of support from relatives inside and outside the household. An uproar went up about the indignities of being asked to sign the "pauper's oath."

What privileges were accorded white-collar workers in the design and implementation of federal relief? I will address this question by proceeding thematically rather than chronologically.

Efforts to Create White-Collar Work Projects

Whenever the subject of work relief was on the agenda, Hopkins and his staff made special efforts to generate projects that would hire substantial numbers of white-collar



workers to do white-collar work. As a general rule, federal relief administrators relied on the states to generate work-relief projects. During the CWA period, the states did utilize white-collar workers, disproportionately using the states' allotment of non-relief jobs on them. They were hesitant to do more: There was some truth to local officials' concerns that the white-collar workers receiving jobs under CWS programs were not in as dire need as were many blue-collar, direct-relief recipients who had lost out in the competition for scarce CWA jobs. Notwithstanding these concerns, Hopkins was convinced that the states were not meeting the full extent of the need for white-collar jobs, and he created a special Federal Projects program to solicit white-collar projects from federal agencies.

Given the chaotic conditions of the demobilization of CWA in the spring of 1934, many CWA workers, white- and blue-collar, were being removed from relief jobs who might well have proven eligible for relief work under stricter FERA standards. Hopkins's concern with white-collar workers was so great that he was willing to create 5000 new white-collar jobs while at the same time eliminating the CWA jobs of the "labor people" and moving them to the most humiliating form of direct relief—the grocery order—all on the condition that it be done secretly.

Relief Budgets

Both for purposes of direct relief and of FERA needs-tested work relief, a central question raised by the task of relief administration was how to determine how much relief each family or person needed. The rhetoric of federal relief was that each family (or person, if the recipient was single) would receive enough to live at a minimum standard of decency, but no more. There was no mention by Hopkins and his staff in their public statements that this minimum standard of decency would differ depending on the prior occupation of the applicant. Yet consistently, and for the most part silently, federal relief policy was to set family budgets higher for white-collar workers than for blue-collar workers, regardless of their prior incomes.

The two main reasons for the award of higher family budgets to white-collar workers are hard to disentangle. One was that white-collar workers were a different, and better, kind of person. The other was that white-collar jobs were a different, and better, kind of job. Both pointed in the same direction: more money for white-collar workers.

First, white-collar government officials could see the dignitary loss that would come from failing to consider past living standards for white-collar workers but failed to see that loss for blue-collar workers.

Second there were perceived differences between white- and blue-collar work that were used to justify higher budgets for white-collar workers. Whenever work relief was needs-tested, the extent of a worker's need determined the number of hours he or she could work. Much relief work was,

a dangerous threat to morale—but especially to the morale of the white-collar worker.

For workers able to secure CWA jobs without going on the relief rolls, the CWA had solved the problem of the humiliating relief-application process. But for those applying for the 50 percent of CWA jobs reserved

The (often unstated) claims of white-collar workers were seen by Federal Emergency Relief Administration officials as legitimate; the anticipated objections and needs of skilled blue-collar workers were not.

therefore, part time. But very early on it was decided that certain kinds of work could only be done properly on a full-time basis—that certain jobs could not be divided among multiple workers. At first, this claim was made only for supervisory relief work. Soon, however, all white-collar work came to be seen as presumptively nondivisible. This perception, in turn, made the states more reluctant to design white-collar work projects.

Hopkins and his Washington-based staff responded to this problem by instructing local-level relief-office workers that they should consider white-collar workers' previous standard of living in determining their need (and, therefore, in setting their working hours). In addition, when Hopkins' staff lobbied agencies to create white-collar relief jobs in federal agencies, they emphasized the fact that white-collar budgets were high enough to permit full-time work. Not only did this policy lead to more white-collar jobs and higher relief grants to white-collar workers, it also allowed white-collar workers more readily to believe they were being given "real" jobs rather than relief—a belief that the agency perceived as necessary to the preservation of their dignity—even when, in fact, jobs were needs-based.

The Relief Certification Process

There was a very strong rhetoric in all of Hopkins's public speeches that being required to apply for relief was an injury to dignity for all workers, but even more so for white-collar workers. The most traumatic element of going on relief was understood to be the relief investigation itself. Applicants would wait in long lines, often outdoors and in foul weather; they would be asked highly personal questions about why they lost their jobs, about their finances and those of any relatives who might be able to support them, and about their remaining assets. This very process, Hopkins and his staff thought, was

for those on relief or for CWS jobs, CWA did nothing to change the relief-application process. For the white-collar workers forced to apply for needs-based work relief, Hopkins and his staff struggled to design a dignity-preserving application process that could be implemented without drawing negative attention from those excluded from it. Local relief offices were given a good deal of leeway to experiment in finding ways to take white-collar workers "out of intake"—in other words, to certify them for relief under a friendlier application process. In addition, Hopkins' office made clear that it wanted local offices to allow professional associations to certify their members' relief eligibility. No similar arrangements were made for labor unions to certify the eligibility of their members.

The greatest pressure for finding an alternative way to certify the need of white-collar workers emerged in the CWA demobilization period, when thousands of white-collar workers would face the normal relief-application process for the first time. When demobilization began, Hopkins had the following exchange at one of his frequent press conferences:

Mr. Hopkins:

One of the most important groups is the white-collar crowd, all over the country. I think that you have to determine that need through a different type of investigation as to need, than you do with the run of families. I am inclined to think that it should be done in a separate office for professional people, and in that office to have people who are of the professions, perhaps, to interview and to see these people and to talk with them, and I think it can be done. In fact, I know it can be done and in a way that will not offend the dignity of an unemployed person, on the one hand, and will, at the same time, protect our interests by not throwing away public funds on people who do not need it.

So I think we must have machinery that is not class distinction, but work distinction. I do not believe in setting up two relief offices, but it seems to me that this white-collar group constitute a different problem. If you are going to have, say, newspapermen, engineers, architects, doctors, or draughtsmen ask for relief, it calls for a new technique.

Query:

But when they get onto the basis of need, they are no longer white-collar men, are they?

Mr. Hopkins:

That does not change the type of work they are fitted for and are looking for.

Once again there was a call for differential treatment to protect white-collar dignity. Indeed, Hopkins' field investigators predicted dire results from any failure to protect white-collar workers: Many, investigators reported, would rather starve than go through the relief-application process on these terms. But key field investigators, such as Lorena Hickok, predicted that skilled blue-collar workers, through their unions, would strenuously object to any efforts to remove white-collar workers from the standard intake process without also according that privilege to them.

Despite the heightened risk of political controversy during the intense CWA mobilization period, Hopkins continued under FERA the process of allowing professional organizations to vouch for their members' relief eligibility, and instructed FERA work projects to give work relief to white-collar workers whom they determined to be relief-eligible but who were not on the relief rolls.

Educational Programs for the College-eligible

One additional privilege to consider is the creation of special programs under the federal relief operation for advancing the college education of college-eligible, unemployed youth... In the absence of programs that subsidized advanced skill training for young blue-collar workers, the college education program established unequal starting points for Depression-era young adults with blue-collar versus white-collar trajectories.

In the Hopkins picture of class in the early 1930s, all white-collar workers enjoyed a status superior to that of all blue-collar workers. Hopkins, I am sure, would not have seen anything controversial in his picture of the class system. For Hopkins, preserving legitimate claims to dignitary difference was the same thing as helping people to resist the demoralizing effects of the Depression, so that American moral and social capital would remain intact.

Indeed, it might seem that Hopkins was simply engaged in a "hierarchy-neutral" approach to governmental action—one in which it is the job of governmental actors to understand the class system well enough to assure that their programs do nothing fundamentally to change it. If that is the case, his special concern for white-collar workers disappears into a neutral principle of treating each group exactly according to its desert under the rules of the existing social order. This hypothesis, however, fails to fully account for the historical record for four main reasons: Hopkins's position regarding black and Mexican workers; his interventions on behalf of working women; his treatment of skilled "blue-collar" workers; and the method of defining the "white-collar" category itself.

During her investigatory visits to the South, Lorena Hickok forcefully argued that FERA should acknowledge the traditionally lower standard of living for blacks and Mexicans and treat them accordingly. There is no evidence, however, that Hopkins ever embraced this view as a desideratum. When it came to blacks, Hopkins' Washington-based staff accepted hierarchy-neutrality only as politically necessary, when they accepted it at all.

Similarly, Hopkins' interventions in favor of the interests of working women—including single, white-collar working women—bear more of a relationship to his and his aides' own experiences in the female-heavy field of social work than to any conservative sense of hierarchy-preservation.

In addition, Hopkins' treatment of skilled, often unionized, blue-collar workers seems to reflect a vision of the social order that was hotly contested by those workers and their unions and that was hard to see as hierarchy-neutral. In the pre-New Deal period, the claim of the skilled industrial worker to a superior position within the industrial hierarchy would have to have been recognized by anyone operating on a principle of pure hierarchy-neutrality. Instead, FERA policy-makers never embraced the status claims of skilled workers as entitled to protection.

Finally, there is the question of the "white-collar" category itself, as defined through practice within FERA and the CWA. The Hopkins approach to the white-collar classes was to treat all levels of white-collar workers the same way, unless administrative necessities made it impossible to do so. There is no way that a hierarchy-neutral approach could have failed to miss the fact that lower-level clerical workers were generally poorly paid (paid less than skilled artisans, by and large) and that their standard of living had little in common with that of high-level professionals.

The real operating principle, then, behind special privileges for white-collar workers was not pure hierarchy-neutrality. Hopkins

and his staff made value judgments of their own about who was entitled to preserve a heightened sense of dignity through the horror of the Depression. By using the collar-color line as the dignitary line, Hopkins reinforced one view of the American class system—but not the only reasonable view of the American class system.

From the perspective of the most powerful elements within the society as a whole, the experience of the New Deal social programs I am studying contributed to the shaping of a class system built around the special salience of the collar-color line. The "hot spot," the contested arena for the maintenance of that system, is the point at which lower-level white-collar workers and upper-level blue-collar workers meet and their life chances intersect and, at times, change places. But the beneficiaries of Hopkins' assertions of white-collar privilege were not themselves organized to participate in any sort of project of class conflict, and by and large they experienced their own battleground as being psychological rather than social. Similarly, unionized blue-collar workers' efforts were directed at maintaining the dignitary distinction between their position and that of the unskilled. It was unskilled workers they encountered in the relief workplace, and it was descent into the category of the unskilled they most feared. However, the fact that these two key groups did not experience themselves as competing with one another does not mean they were not in fact competing with one another. They in fact were competing, seen from the standpoint of the class system as a whole rather than from the standpoint of their own direct experience of it.

Dignity is not a scarce commodity when each group within a society is free to define its own dignity in its own terms. It becomes a scarce commodity when some groups have more social, cultural, and political power than others and can represent their views as the views of the country as a whole—or at least of those who really count. That is precisely what Hopkins succeeded in doing for white-collar workers through his relief programs. Hopkins proclaimed what it meant to be the best kind of American, and his model of the best American was the white-collar worker. Skilled blue-collar workers lost status and relatively unskilled white-collar workers gained status, and it happened without a blow or a word being exchanged between them. This is class conflict in a different voice, perhaps, but it is class conflict all the same—with government actors serving as umpires. They call it like they see it and, by doing so, help to shape what it is. ■

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Rethinking the Justice System: Crime and the Community

Anthony C. Thompson looks at how behavioral standards are enforced, and analyzes a new take on the prosecutor's role in society.



This article, adapted from “It Takes a Community to Prosecute,” published in The Notre Dame Law Review, identifies a key problem as the police, judges, prosecutors and defenders partake in the national trend toward community collaboration and away from reactive law enforcement—namely that a coherent vision to guide those experimenting with community prosecution is lacking. Anthony Thompson, Professor of Clinical Law, has extensive practical litigation experience from working as a deputy public defender for nine years before joining the NYU School of Law. He is the former director of the Prosecution Clinic, a year-long seminar that places students in the District Attorney’s Offices in Manhattan and the Bronx to allow them to see firsthand how race, ethnicity and class influence discretion in the civil justice system. “Professor Thompson here supplies the essential ingredient that was missing from the early efforts to inject a community-based approach into prosecution work: a theoretical conception of what a community orientation should seek to accomplish and how it should differ from the traditional definition of the prosecutorial function. He melds a rigorous, theoretical analysis with a pragmatic diagnosis of the actual workings of the criminal justice system,” says Randy Hertz, an NYU Professor of Clinical Law and the director of Clinical and Advocacy Programs. “Professor Thompson’s scholarship perfectly realizes the Law School’s vision of ‘clinical scholarship,’” says Hertz, “in that it grows directly out of the author’s practice experience and clinical teaching.”

The past decade has witnessed a fundamental shift in the ways the major players in the criminal justice system define their roles. Police departments have eased away from a traditional reliance on reactive forms of law enforcement toward community policing efforts that emphasize collaboration with the community. Judges have launched problem-solving courts in a number of jurisdictions, both to target recurring criminal justice problems and to devise ways that courts might work more actively with communities to develop treatment plans for offenders. Public defender offices have, albeit to a lesser extent than these other entities, begun to open community offices or specialized units designed to focus on community justice initiatives. Although the activities of these criminal justice players may differ in various respects, a common thread is apparent: Each has recognized the need to fashion a role that is less reactive and more participatory in relation to the communities with which—and in which—they operate. What these efforts evidence is a core appreciation for an invigorated role for the community in defining and enforcing standards of conduct.

To varying degrees, prosecutors also have taken nascent steps to reinvent themselves in the midst of this changing environment. In ever increasing numbers, prosecutors’ offices have launched, or are on the verge of launching, “community prosecution” programs.

These efforts have sought to augment the traditional notions of the prosecutor. It remains unclear precisely how much this transformation flows from a desire to be self-critical about the conventional role of prosecutor rather than an instinct to ride the contemporary tide toward including the community in the operations of the criminal justice system. But, whatever the reason, the phenomenon of community prosecution has taken hold in offices across the country, encouraged and accelerated by the availability of federal funding. The “community prosecution” label is now widely used and broadly applied.

It is not at all obvious, however, what the term “community prosecution” actually means. At a minimum, the term would appear to connote a decentralization of authority and accountability, with the ultimate aim of enabling an office to anticipate and respond to community problems. Such a model presumably would place an emphasis on preventive measures for controlling crime instead of the reactive, case-driven approaches that tend to characterize traditional prosecution efforts. Assuming the accuracy of this description, and given the degree of change in focus and approach that it represents for an entity that wields tremendous power in the criminal justice system, one would expect a widespread, explicit discussion of the penological, practical, and even ethical implications of such a sea change in the conception of a prosecutor’s role and functions. But there has not as yet been a comprehensive analysis of the new community-based model of prosecution. In the absence of such a detailed analysis and common understanding, there is a risk that individual prosecutors’ offices may develop ostensibly “community-oriented” strategies that ultimately fail to improve their collaboration with—and responsiveness to—the communities that they hope to serve.

My own informal observations of community prosecution efforts have offered graphic evidence of both the promise and potential problems of the new shift to a community orientation. Some of the new community prosecution programs have begun to forge exciting new working partnerships with communities in preventing and addressing crime and in defining justice. But when one considers the gamut of initiatives as a whole, it becomes apparent that what is lacking is a coherent vision that will systematically guide offices as they experiment with varying versions of community prosecution.

Of course, experimentation may well be a virtue in imagining and giving life to constructive relationships between prosecutors and the communities that they serve. Especially if detailed accounts of different experiments are disseminated, digested, and



"What is it about you that makes the federal government want to prosecute you to the fullest extent of the law?"

debated, prosecutors' offices can learn from each other, tracking the possibilities, trade-offs, and challenges implicated in various models of community prosecution. However, too much of what now passes for deliberate experimentation seems to be only haphazardly designed and implemented, not regularly or carefully studied and not well understood either by those interested in learning from the experiments or even by the offices actually engaged in the experimentation.

Serious treatment of the concept of community prosecution would seem to require deeper thinking about the goals, values, and optimal methods of a community-oriented approach than is currently apparent.

The Conventional Vision of the Prosecutorial Function

Prosecutors do not frequently find themselves having to define their vision of practice. Like most lawyers and most professionals of any field, prosecutors think mainly in terms of routines, tasks, and deadlines and rarely about the "big picture" that frames their day-to-day labors. This almost inevitable micro-focus typically results in insufficient attention being paid to any aspects of the practice that are tacit or inchoate. If pressed for a conceptual assessment of the nature of the practice, working prosecutors characteristically offer earnest yet incomplete accounts. A fair number invoke images of a crusader or even a gladiator. Some depict themselves as "carnivores" or as pursuing "only those

things that are right." Others, offering more measured accounts, describe the prosecutor as having a special mandate and set of obligations within the criminal justice system. Yet even these more sober accounts typically are fragmentary rather than thorough.

As a general matter, it seems both feasible and essential to articulate a coherent vision of prosecutorial practice that captures the essential philosophy underlying the thinking and actions of prosecutors. Indeed, the very advent of a community prosecutors' movement suggests the viability of such a project: Those within the movement are reacting against a certain idea, philosophy, or vision of prosecution that they regard as incomplete or perhaps too myopic. This new vision seeks to broaden the role of the prosecutor and question the limits of the conventional charge-convict-sentence paradigm that propels most offices. The implicit premise of this exchange of views is that there is, in fact, a conventional vision of prosecutorial practice that can be articulated well enough to debate. Thus, before commencing our exploration of the wisdom of replacing the existing approach with a new, community-oriented model, it is useful to first identify the contours of the currently dominant vision of prosecutorial practice. Given our focus on the subject of community prosecution, it seems fitting to begin by considering the conventional model's vision of the constituency to be served.

The prosecutor's constituency is generally understood to be "the people" of the geographical division that the prosecutor has been elected or appointed to represent. In this regard, the prosecutor's role is a unique one, for she serves as both advocate and "minister of justice." As the U.S. Supreme Court has observed, "the American prosecutor" plays a "special role ... in the search for truth in criminal trials" because the prosecutor is the representative not of an ordinary party to a controversy but of a sovereignty whose obligation to govern impartially is as compelling as the obligation to govern at all, and whose interest, therefore, in a criminal prosecution is not that it shall win a case but that justice shall be done.

In defining the prosecution function, the Model Rules of Professional Conduct and the American Bar Association Standards for Criminal Justice similarly articulate a model of an advocate who must take into account considerations that seem fundamentally at odds with the very notion of adversarial advocacy. As minister of justice, the prosecutor must endeavor to represent the interests of society as a whole, including the interests of those individuals who have run afoul of the law.

Yet, the very concept of serving "the people" is inevitably imprecise, even amorphous. Prosecutors certainly initiate prosecutions in the name of "the people" and maintain a trustee's obligation to safeguard the people's interest. But the extent to which prosecutors actually serve the people themselves or instead serve the government remains unclear. By imposing standards of conduct and applying laws against offenders, prosecutors necessarily act as an enforcement arm of the government against the people. And when one filters prosecution through a pragmatic political lens, it seems obvious that decisions about whom prosecutors serve and how they serve them will inevitably be influenced—and at times determined in part—by legislative funding choices. In a world of limited resources, prosecutors must act in accordance with the priorities of their funding authorities. That rationing of services and targeting of problems may determine and limit whom prosecutors actually serve.

Yet, in trial arguments and sentencing colloquies, prosecutors regularly, almost reflexively, invoke the people's name and authority. In so doing, they seem to intend that their positions be accorded special weight because they convey the backing of the general public. Assuming this rhetorical stance is adopted in good faith, the question inevitably arises: To what extent is a prosecutor obliged to maintain close contact with the community she serves, consult representatives of that community on relevant matters, and provide members of the community with an

opportunity to offer input on exercises of prosecutorial discretion?

The traditional prosecutor tends to maintain distance from the constituency she has been elected or appointed to represent. Many, perhaps most, prosecutors who adopt this stance would say that distance is a necessary precondition for the independence that prosecutors need in order to perform their functions. Prosecutors seem to depend on distance as a means of maintaining perspective as the arbiter of right and wrong and as the “mediator” between broad legislative prescriptions and the equities of individual cases.

Such distance is hardly mandated by political theory, however. Indeed, one could regard close, regular contact with those who are being served as elemental to the discharge of a prosecutor’s obligations. Over the years, some have faulted the prosecutor’s traditional stance of detachment on this ground. They have urged that “serving the people” must mean something more than merely election-driven activities. Instead, it has been said, prosecutors and their constituents should aim to achieve a relationship that mutually informs and shapes their agendas and their strategies. But the difficulty of persuading others to join in this effort has had the net effect of reinforcing the hold that the conventional wisdom has on the minds and actions of most prosecutors. The conventional view of a prosecutor’s legal and political obligations has come to feel not just correct but natural.

The American system of criminal justice traces its roots to the English system. In the early Middle Ages, England had no formal system of criminal justice. The community and the individual victim were directly involved in the apprehension and prosecution of the offender. The victim of a crime would assume the role of police officer when organizing a patrol, typically relying on family and friends to pursue and capture the offender. If the victim succeeded in apprehending the guilty party, the community ensured that the perpetrator was physically punished for the crime and then required to provide restitution to the victim. Until 1897, England had no public officer or court official charged with the responsibility of prosecuting crimes. Although the king’s attorney (the early version of the attorney general) had official duties, all such duties fell within the rubric of protecting the king’s interests.

The criminal justice system of the colonies reflected the influence of the British system, although that system certainly was not adopted wholesale. As in the English system, the American criminal justice system consisted of actions brought by individuals who had been victimized. Actions were brought by “sheriff prosecutors,” who were later replaced by deputy attorneys general.

But concerns began to surface about prosecutions by victims. Some worried that victims were often at the mercy of shrewd defendants. Repeat offenders, who had proceeded through the criminal justice system at least once, often gained an advantage over first-time victims because the offenders had amassed a certain procedural knowledge from previous experiences. Critics of the private prosecution approach also expressed concerns about abuses of justice stemming from collusion between the parties. The accused and the accuser would often meet and settle out of court for a negotiated percentage of the penalty. This practice, in turn, threatened the financial solvency of the courts.

Such criticisms and concerns led to an effort to distance the prosecution function from the victim of the crime. In 1704, Connecticut became the first colony to eliminate the system of private prosecution entirely. The statute of 1704 created a position for a professional to “prosecute and implead in the law all criminals.” In 1832, Mississippi became the first state to include in its constitution a provision for the popular election of local district attorneys. The concept of an elected prosecutor eventually caught on and, by 1912, most states had provided for locally elected prosecutors.

The responsibility of the public prosecutor dramatically altered the prosecution function. Rather than simply serving as an advocate for the victim, the public prosecutor was the representative of the government. To complement and supplement the traditional advocate’s role, the public prosecutor received both the authority and the considerable resources of the state. Consequently, she could make discretionary decisions about how and when she should deploy those resources in actions brought against an individual. And the public no longer could make the decision to prosecute. Yet the public nonetheless maintained a role, although obviously more limited, in the prosecution function—through its voting power.

Or so it appeared. The advent of the locally-elected professional prosecutor has led to an unexpected dichotomy. On the one hand, some argue, the electoral process has forged a system of direct accountability to the people in an increasingly bureaucratic society. On the other hand, many insist that the desire for neutrality has driven a wedge between prosecutors and those individuals and communities that need their services. Of course, at a minimal level, the community can maintain a voice in prosecution through the electoral process: The public can approve or disapprove of a prosecutor’s track record or stated agenda by electing a candidate to that office or by voting a prosecutor out of office. But during the prosecutor’s term, the voting public has little or no ability to

influence policies and practices. Moreover, the neighborhoods that most often experience the greatest incidence of crime tend to participate least in the electoral process. This disenfranchisement—some self-imposed and some not—often fuels both the perception and reality of a gap in policy goals between the prosecutor’s office and the neighborhood in which it operates.

As the police, courts, and defense lawyers have found ways to collaborate with communities in the exercise of their functions, there has been mounting pressure on prosecutors to follow suit. Victims’ rights groups have been particularly vocal in demanding greater prosecutorial attention to community concerns. These groups have drawn attention to—and, at times, enacted legislation to correct—what they perceive as a tendency on the part of prosecutors to be insufficiently sensitive to victims’ needs. Similar criticisms of prosecutors have been voiced by communities of color. There is a perception in some communities of color that prosecutors’ offices—which, in most regions of the country, tend to be staffed by predominantly white lawyers—are inattentive to (and sometimes even suspicious of) victims of color.

Some prosecutors’ offices have responded to such expressions of mistrust by reaching out to the communities they have been elected or appointed to serve. For example, Eric Holder, the first African American to serve as U.S. attorney for the District of Columbia (a position that involves oversight of local prosecutions in the local District of Columbia courts as well as the district’s federal courts), responded to longstanding community criticisms of his predecessors by embracing the mandate to develop better ties with the African-American community.

Some community groups have been explicitly critical of the degree to which prosecutors are physically removed from the communities they represent. Prosecutors have responded by promising to reach beyond the confines of their own offices in defining and fighting crime. Montgomery County (Maryland) State’s Attorney Douglas Gansler has divided his office into districts and encouraged his attorneys to become active in the community to which they are assigned.

Prosecutors in other regions have similarly sought to decrease the distance and detachment of the office by attending neighborhood events and meetings held by other institutions. Some prosecutors have taken the even larger step of placing prosecutors’ offices within the community itself in storefronts, police precincts, and housing projects.

Some of the prosecutors who have taken such remedial measures may be partly or even predominantly motivated by self-inter-

est: They perceive that vocal community criticisms can result in a loss in the next election for the position of district attorney. Other prosecutors may be acting on the basis of a professional vision of prosecutors as elected officials who have a fiduciary obligation to respond to the complaints of their constituents. Still others may appreciate that communities have skills, information, and knowledge that would be useful to tap. Even those prosecutors who are not initially driven by the desire to draw on community expertise often come to recognize this fundamental benefit of collaborating with community members.

Just as successes of community policing programs led some community groups to demand greater access to and involvement in the work that prosecutors do, so too the successes that existing community prosecution programs have enjoyed now foreclose conventional prosecutors from maintaining that the community has no meaningful role

being the most common. But precisely how close do they mean these partnerships to be? Should community residents now be understood as having fully equal voting powers on prosecutorial policies and decisions? What constitute the terms of the partnership?

For all their populist rhetoric, not even those prosecutors who are deeply committed to community prosecution would endorse a model that cedes control to the community or even treats the community as a full voting partner. Because communities almost always are divided, neither of these formats is feasible as a practical matter, at least when it comes to daily decision-making. The danger that one segment of a community might choose to use enforcement power against another, less powerful segment has too many discomfiting historical precedents to be ignored.

Even if communities were more monolithic and single-minded, few adherents of the community prosecution model would champion the view that communities should control prosecutorial decisions or have a

would consider themselves regularly and fully accountable to their constituency for their choices, just as communities would regard themselves as accountable to their elected prosecutors for the obligations they would arguably impose on prosecutorial work and for the consequences their views would have on the community as a whole.

Under such a model of prosecutorial service to “the people,” elections would remain central events. But they would no longer serve as largely isolated instances of community participation and prosecutorial accountability. Instead, an election would be one of a series of regular events or occasions that define the relationship between the prosecutor and the community and provide opportunities for the entities to share their views of crime, criminal justice, and prosecutorial policies and programs. Such events would form the bases for an ongoing relationship in which both entities would do their best to understand (and, over time, get better at understanding) the aspirations, concerns, and constraints of the other.

A relationship of this sort requires that both parties take risks and accept compromises. The prosecutor must be willing to accept the greater vulnerability that an open relationship entails. She must be willing to hear frank opinions of her actions, her judgment, and even her suitability for the job. She must be mature enough to accept criticism without anger and without engaging in counterattacks or reprisals. The experience often will be far less comfortable than hiding behind a mask of detached professionalism and expertise, but the personal risks are certainly justified by the potential benefits of better informed and more effective fulfillment of a prosecutor’s responsibilities to the public.

The members of the community, for their part, must accept certain harsh truths, most notably that they will not always, or even often, get their way. They must learn to tolerate a relationship that promises them no more than an opportunity to have their voices heard. They must also come to appreciate that the prosecutor operates within a web of political and legal constraints, and that even prosecutors of good will may not be able to make certain promises or accomplish certain ends. Like the prosecutor, they must come to understand that the benefits that stem from such a relationship often are accompanied with considerable frustrations and disappointments.

The ultimate process, which is one of mutual learning, has the potential to change virtually every aspect of the relationship between prosecutors and their constituencies. It opens up highly promising, if frighteningly unfamiliar, possibilities in all one considers elemental to a prosecutor’s practice. ■

A relationship of this sort requires that both parties take risks and accept compromises.

in the work of a prosecutor’s office. Prosecutors no longer can treat conversations with voters at election time as an adequate vehicle for communicating with constituents.

What is not yet apparent, however, is what new kind of relationship should be forged. Those within the community prosecution movement—even the best among them—have not yet determined what they should substitute for the traditional prosecutor-constituent relationship. The existing experiments, which are inspired by an image of political and legal relationships, reveal a shared aim: They strive for a robustly participatory role for the constituents. But to describe relationships as participatory, for all its evocative power, opens more possibilities than it closes. Mapping those possibilities and frankly marking preferred routes then becomes a central concern.

Those informed by a vision of community prosecution believe that prosecutors should make regular efforts to learn from those they serve, to explain choices they may be considering or find themselves pursuing, and to hold themselves more transparently accountable for their policies, decisions, and record. They search for ways for prosecutors and their constituents to make themselves more immediately available to and in touch with one another. In the course of describing these general ambitions, they even label the relationships they believe themselves to be forging—“problem-solving partners” perhaps

fully equal vote in such decisions. Such models evoke the specter of vigilantism—or perhaps a return to earlier, crude forms of prosecution that more closely resembled mob justice than professional prosecution. Perhaps there are those among victim-rights groups or within particular low-income urban neighborhoods who, for contrasting reasons, yearn for some absolute or at least more effective ways to exert influence over local prosecutors. But they themselves have not yet fully elaborated their impulses. In any event, not many would seem to find the view politically and morally compelling. And equally important, any arrangements approaching full partnership would seem inappropriately to delegate the prosecutor’s duties and to abdicate her responsibility as a minister of justice.

The type of relationship that would seem best-suited to accomplish the general goals of community prosecution without running afoul of one of the foregoing problems would seem to be a hybrid relationship or loose partnership. This sort of partnership imagines that both prosecutor and community would be mutually informed and mutually accountable. Prosecutors would retain final authority over broad policies and daily decisions. At the same time, they would regard community input as central to their thinking, just as the community would regard the prosecutor’s views as central to the opinions they express. And prosecutors

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By the full-time, visiting, global, and library faculty

October 1, 2002, through September 30, 2003.

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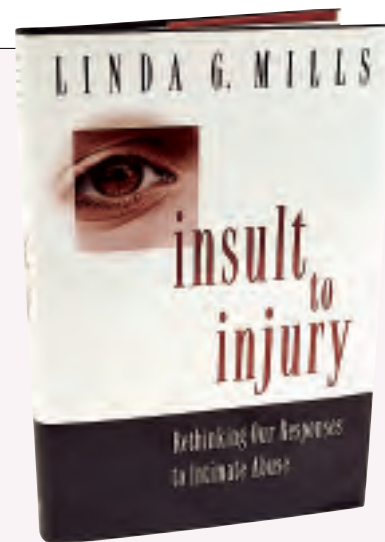
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Insult to Injury: Rethinking Our Responses to Intimate Abuse

By Linda G. Mills

Published by Princeton University Press
\$19.95

There was a time when police and prosecutors did not take domestic-violence allegations all that seriously. But has the pendulum swung too far in the opposite direction? Perhaps so, suggests Professor Linda G. Mills in *Insult to Injury*.

"Study after study confirms that arrest, prosecution and incarceration do not necessarily reduce the problem of domestic violence and may even be making the problem worse," writes Mills, Vice Provost of University Life and Interdisciplinary Initiatives and Professor of Social Work and Affiliated Professor at the NYU School of Law

Mills challenges many of the assumptions behind the lock-em-up initiatives, including the belief "that all violence warrants a state response and that women want to leave rather than stay in their abusive relationships."

She also argues that at least some women in abusive relationships can themselves be aggressive—and one consequence of mandatory arrest policies is that more women than ever end up arrested. For instance, she writes, in Los Angeles in 1987, a total of 340 women and 4,540 men were arrested for domestic violence; in 1995, the number of women arrested had nearly quadrupled to 1,262, while the number of men arrested was 7,513—not even double the 1987 figure. "What if," asks Mills, "some part of the reason women are being arrested is because they are involved in a dynamic of intimate abuse?"

Ultimately, Mills argues in favor of healing the family with a therapeutic approach or restorative justice—in which participants work to resolve the underlying problem—rather than invoking the traditional punishment-centered machinery of the criminal justice system.

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Men Have no Monopoly on Violence

By Linda G. Mills

May 18, 2004

The now notorious photograph of Pfc. Lynndie R. England holding a leash around a naked Iraqi prisoner's neck shocks us for another reason few are talking about: England is a woman.

The photograph stuns because the conventional wisdom is that men are violent, and it is women who are their victims. Women simply don't behave the way England is behaving. Violence, brutality, degradation—it's not a part of the feminine vocabulary.

Yet, the truth is women can be as violent as men. More than 100 studies now confirm that women and men commit equal amounts—about 12 percent—of physical violence in their intimate relationships.

In a 1997 New Zealand study of young adults, 24 percent of women admitted to perpetrating severe physical aggression. In contrast, only 8 percent of men admitted to committing severe physical aggression.

Although men cause more physical injury to their female partners, it has been shown that girls and women draw on their well developed emotional strength to express aggression.

This begs the question: When and how did women become so violent?

The truth is that neither gender has a monopoly on violence. Male and female aggression is a reality. The more interesting question is how people become violent in the first place.

Theories about why and how people become violent abound, and it is clear that violence doesn't occur in a vacuum. In most cases, women, like men, learn savagery. Although there is some emerging evidence that violent tendencies can be inherited or traced to injuries to the brain, the most common cause of violence in adults is rooted in what they learned as children.

Sociologist Lonnie Athens describes the process of learned aggression as "coaching," which almost always begins in childhood. An abuser is set on a tragic path of violence by an abusive parent or other adult who exposes that child to a series of assaults.

The impressionable child is encouraged by the violent adult to react in kind, rather than walking away or backing down. The message is clear. Violence is encouraged; it is an acceptable and appropriate way to solve problems.

My own view of women's violence extends these observations one step further. Women can be coached toward violence by abusive partners, especially if they marry at a young age. They can also learn to become violent through coaching by other influential role models—including superiors.

The little we know about Lynndie England's background suggests that the seeds for violence may have been planted early on. Although England's parents seem unaware of it, hunting animals—apparently a common practice in England's family—may have contributed to their daughter's lessons in aggression.

My guess is that the military possibly finished what England's family started. At 17, when England joined the reserves, she was still impressionable and poised for further coaching.

The fact that we expect England, or for that matter anyone in the military, to resist coaching defies what we know about war and what we expect from our soldiers. Military personnel are taught—in fact, coached—to kill. They are taught to value their own American lives over others.

Brig. Gen. Janis Karpinski, in defending her role as commander of the 800th Military Police Brigade, has said publicly that she believes the military police were "coached" into abusive acts by military intelligence officers. Indeed, the reason that the military works is because young, impressionable minds can learn aggression.

Gender is irrelevant to the process.

Perhaps the most important lesson we can take from these disturbing photos is that it is easier for men and women to learn to become violent than it is for them to unlearn it. That's why, when it's war we're contemplating, we'd better be sure it's worth the fight.

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Linda G. Mills, author of *Insult to Injury: Rethinking Our Responses to Intimate Abuse*, is a professor of social work and affiliated professor of law at New York University.

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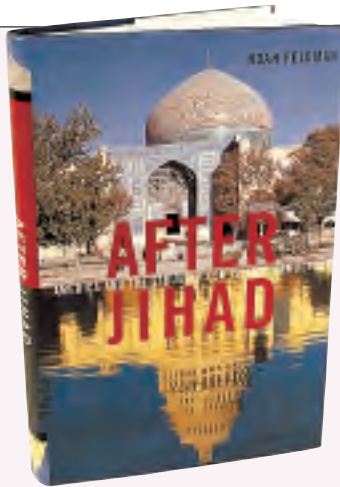
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After Jihad: America and the Struggle for Islamic Democracy

By Noah Feldman

Published by Farrar, Straus, and Giroux
\$24

"Can democracy be made to flourish in the lands where Islam prevails?" asks NYU School of Law Professor Noah Feldman in his first book *After Jihad*. Feldman, who was the senior adviser for constitutional law to the Coalition Provisional Authority in Iraq last year, is optimistic that the answer is yes. "Contrary to what is sometimes believed in the U.S., Islam is not inherently committed to the overthrow of Western ideals," he argues.

In *After Jihad*, Feldman examines other countries with large Muslim populations, including Turkey, Pakistan, Iran and Indonesia, to show how democracy and Islam can be compatible. "Islamic organizations in Indonesia played an important role in bringing about greater democracy there," he writes, adding that although Indonesia isn't "an Islamic state," the country "shows how a flexible Islam can participate in democratic development and democratic politics."

The timely book takes a hopeful stance on questions currently troubling many leaders and foreign policy specialists. While some see the terrorist attacks of 2001 as proof of extremism in the Muslim world, Feldman argues here for another interpretation: "September 11th and the sporadic attacks which have followed," he writes, "are the last, desperate gasp of a tendency to violence that has lost most of its popular support."

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The People Themselves: Popular Constitutionalism and Judicial Review

By Larry D. Kramer

Published by Oxford University Press
\$29.95

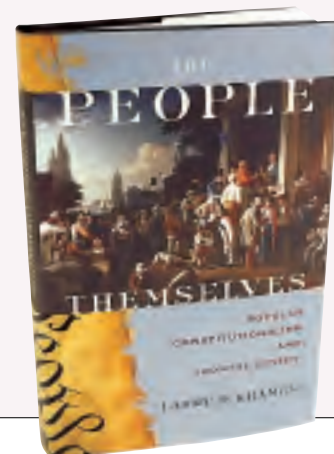
Today, it’s pretty much taken for granted that the Supreme Court has the last word on controversial issues—be they affirmative action, sodomy laws or even recounting votes in a presidential election.

But previous generations weren’t so sure.

In *The People Themselves*, Professor Larry Kramer, former associate dean for academics and research at NYU School of Law, traces the history of constitutional interpretation and the rise of the Supreme Court’s power. Drawing from early cases as well as essays, newspaper articles, and other writings dating back more than 200 years, Kramer, now dean of Stanford Law School, shows that it was neither inevitable nor intended for the Court to become as powerful as it is today.

His analysis includes a reexamination of *Marbury v. Madison*, the case that supposedly paved the way for judicial review of laws, and concludes that recent interpreters have overstated that case’s role in legal history.

Kramer makes the case that the Supreme Court’s current power is a form of elitism—a development that would make at least some of the architects of the Constitution turn in their graves. “The question Americans must ask themselves,” he writes, “is whether they are comfortable handing their Constitution over to the forces of aristocracy: whether they share this lack of faith in themselves and their fellow citizens, or whether they are prepared to assume once again the full responsibilities of self-government.”



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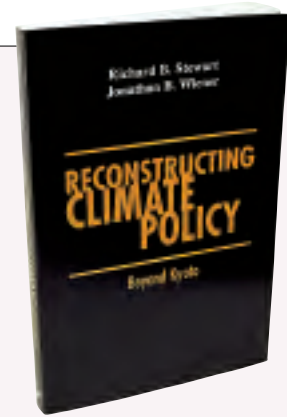
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Reconstructing Climate Policy: Beyond Kyoto

By Richard B. Stewart and Jonathan B. Wiener

Published by AEI Press

\$20

Pollution is a worldwide problem but, so far, the world has not been able to agree on a solution. In *Reconstructing Climate Policy*, commissioned by the American Enterprise Institute, NYU School of Law Professor Richard B. Stewart and Duke University Professor Jonathan B. Wiener tackle the impasse over a strategy to reduce greenhouse gases.

Stewart and Wiener take the position that the Kyoto Protocol is still a workable solution—just not as is. But, they argue, with modifications, the protocol could result in a much-needed, wide-scale buy-in.

What can bring the United States, China and other countries on board? They argue that the ultimate costs of compliance remain highly uncertain, so the vagueness of the requirements is an invitation for countries to stall for as long as possible. The authors propose that any agreement should spell out clear rules for determining emissions reduction and whether countries are within bounds. In other words we need to, well, turn up the heat.

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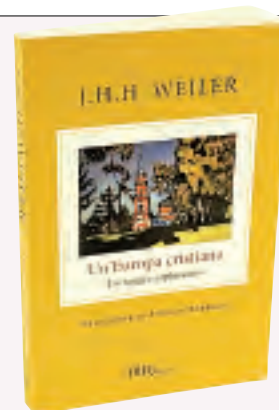
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A Christian Europe

By Joseph H.H. Weiler, Joseph Straus
Professor of Law and Faculty Chair,
Hauser Global Law School Program
Published by *Biblioteca Universale Rizzoli*
Euro 7.50

In *A Christian Europe*, Joseph H. H. Weiler, Joseph Straus Professor of Law and Faculty Chair of the Hauser Global Law School Program, displays his characteristic brilliance, generosity of spirit, and literary flair in defense of the idea that Europe's Christian identity and religious sensibility have a vital role to play in the construction of a united Europe.

Weiler criticizes European Christians as enclosed in an intellectual "ghetto," isolated from public discourse by walls that have been constructed both internally by self-censorship and externally by a dominantly secular mentality. For one of the world's preeminent scholars of European law—and an Orthodox Jew of European heritage—to speak of a ghetto is a sign of the gravity with which he regards the question of Christianity's place in the history and future of European civilization.

Weiler's book is a plea to tear down the walls between religious and secular Europeans, with examples of how Christian Europe's moral and intellectual resources can play a part in paving Europe's future.

Weiler has a nuanced appreciation of the dynamic tension between unity and pluralism in Europe, thus his plea for the recognition of Europe's Christian dimensions is not an assertion of exclusivity but rather rests on a full affirmation of the diversity of European cultures. He initiates a dialogue between the fundamental meaning of European integration, the telos, of European integration and Christian thinking about human dignity, freedom, reason and democracy.

Weiler refers to the book as "an exploratory essay," but it is a unique sort of exploration. G. K. Chesterton once described a wayward British yachtsman who discovered England under the impression that it was a new South Seas island, and he envied the man's simultaneous experience of the joy of homecoming and the fascination of traveling to unknown lands. Weiler's "exploration" seeks just that combination of virtues, discovering anew Europe's home through an astonishing encounter with its own "ghettoized" heritage.

— Paolo Carozza, Associate Professor of Law,
Notre Dame Law School

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ADDITIONS TO THE ROSTER

The New York University School of Law is pleased to welcome five eminent scholars to its full-time faculty, and to introduce to the Law School community a diverse and distinguished group of 33 visiting faculty and fellows. These scholars and teachers hail from 10 wide-ranging countries, including Finland, Japan, and Spain.

New Faculty

Lily Batchelder

A rising scholar in the field of tax policy and social welfare, the NYU School of Law's new Assistant Professor of Law Lily Batchelder



has always had a fascination with the interplay between social issues and economic ones. "I've been interested in low-income and poverty issues for as long as I can remember," she said. "And I'm interested in tax in part because the tax system is increasingly used to

construct social policy." Batchelder, a recent graduate of Yale Law School, has been employed as an associate at Skadden, Arps, Slate, Meagher & Flom for two years.

Batchelder explored the relationship between tax policy and social welfare in her article, "Taxing the Poor: Income Averaging Reconsidered," *Harvard Journal on Legislation* (2003). She argues that the current income-tax system places undue burdens on those with volatile incomes, and makes the seldom-acknowledged point that income volatility not only occurs more often in poor families than middle- and upper-income families, but it is also more onerous from a tax standpoint for low-income families. As a solution, Batchelder proposes a progressive tax policy that averages incomes over a two-year period.

This concern for the challenges facing the poor led Batchelder to take on various jobs in the social service sector. She received her B.A. in political science in 1994 from Stanford University, where she was a director of the Stanford Homelessness Action Network. After graduating with honors and distinction from Stanford, she worked as a client advocate at Neighbors Together Corporation in Brooklyn. There, she served as a social worker for inner-city residents, helped manage a soup kitchen, and organized a community self-help group. She then became secretary of the board of directors, and continues to serve as a member.

Batchelder worked as the director of community affairs for New York State Senator Marty Markowitz and managed his 1996 campaign. She has served as a research associate with the New America Foundation and has held summer positions at the Boston Consulting Group; the Harvard Center for International Development in Nairobi, Kenya, and Cambridge, Massachusetts; the Office of the Deputy Attorney General; the New York-based law firm Cleary, Gottlieb, Steen & Hamilton; and the Tax Section of the U.S. Senate Committee on Finance.

This wide range of practical experience motivated Batchelder to supplement her skills with deeper academic backing. She received an M.P.P. with a concentration in human services and applied microeconomics in 1999 from Harvard University's John F. Kennedy School of Government, where she was a Kennedy Fellow and President of the Kennedy School Student Government. After Harvard, she went on to get her J.D. in 2002 from Yale Law School, where she received the Clifford L. Porter Prize for Best Paper on Taxation in 2001 and 2002. Additionally, she served as founder and director of the Pro Bono Network, editor and book reviews editor of the *Yale Law Journal*, executive editor of the *Yale Human Rights & Development Law Journal*, and director of the Lowenstein International Human Rights Project.

Kevin Davis

A widely published writer on issues relating to nonprofits, contracts and commercial law, and law and development, Kevin Davis joins the NYU School of Law as professor of law. He was formerly a tenured member of the faculty at the University of Toronto.

Davis received his B.A. in Economics from McGill University in 1990. After graduating with an LL.B. from the University of Toronto in 1993, he served as Law Clerk to Justice John Sopinka of the Supreme Court of Canada and later as an associate in the corporate department of Torys, a well-known Canadian law firm.

Since receiving his LL.M. from Columbia University in 1996, Davis has traveled widely in pursuit of intellectual and educational

goals. He began in familiar territory as an assistant professor at the University of Toronto, but soon journeyed to the University of Southern California Law School, where he was a visiting assistant professor and John M. Olin research fellow. After being tenured at the University of Toronto, Davis spent time as a visiting fellow at Cambridge University's Clare Hall and as a visiting lecturer at the University of the West Indies in Jamaica. He came to the NYU School of Law as a visiting professor in 2003, and says he is delighted to spend more time in an educational environment that "has such a buzz about it."

"A big part of the draw to NYU is the city," he said. "The global dimension of the Law School is also very attractive. It's just a really vibrant intellectual community."

Davis is currently working on a book with University of Toronto colleague

Michael Trebilcock, tentatively titled *Law, Institutions and Development Reconsidered*, which will top off the ten articles, five manuscripts, six essays, and five government agency and industry group reports he has already authored or co-authored since 1996.



While he plans to continue this focus on law and development by looking at the English-speaking Caribbean and the theoretical aspects between law and social welfare, his interests do not stop there.

"I've typically been interested in topics on the boundary between commercial law and criminal law," he said. "For example, the limits of commercial morality, and what should count as immorality or fraud in the commercial world?"

A passionate teacher, Davis tries to show his students not only "how to think like a lawyer and understand how to engage in legal reasoning," but, beyond that, "to recognize that they don't always have to take legal rules as given. Some rules vary across time and place; they're malleable. I want my students to see that there's room for debate around the margins, while still recognizing the boundaries."

Moshe Halbertal

A prominent Jewish Studies scholar, Moshe Halbertal focuses on hermeneutics, the interpretation of Jewish law. He will teach at the NYU School of Law for the third time this fall, and recently secured a five-year appointment, for one semester per year, at the Law School. He has also



served as Gruss Professor at the Harvard and University of Pennsylvania law schools. Last year, he gave the Caroline and Joseph S. Gruss lecture on Talmudic civil law.

“I find the NYU Law School an intellectually exciting and alive place,” Halbertal said. He is attracted to “the wonderful component at the Law School which examines the relationships between law and philosophy, mainly political theory, ethics, and hermeneutics.” Halbertal’s scholarship is focused on investigating the connection between Jewish law and legal theory. “What can we learn from Jewish law about the concept of law?”

A Talmud instructor at the Hartman Institute of Advanced Jewish Studies in Jerusalem, Halbertal has published several books to critical acclaim both in Israel and the United States. In 1999 he was a recipient of the Michael Bruno Award given by the Rothschild Foundation in Israel. It is modeled after the MacArthur “genius awards” and given to pioneering Israeli scholars under the age of 50. Halbertal looks forward to imparting his knowledge to students who may never have studied Jewish law. “Students can gain a great deal from a comparative perspective on diverse concerns and problems of the law, drawn from the study of the rich and complex tradition of Jewish law.”

Cristina Rodríguez

A pioneer in the field of language rights, Cristina Rodríguez joins the faculty as assistant professor of law after spending the last year here as an Alexander Fellow. She is currently working on “Language Rights: Four Fundamental Questions,” a four-article progression exploring the principal theoretical questions that she believes should direct the creation of language law and policy worldwide. Rodríguez hopes to use this piece and her other work-in-progress, a comparative study of American and Canadian legal approaches to language diversity, as the heart of a future book.

Rodríguez’s academic work concerns how the law and public policy should approach a linguistically diverse society. She suggests that “one way to deal with the demands made by linguistic minorities is through the

creation of ‘language rights,’ or rights to use one’s mother tongue in certain contexts and under certain circumstances,” offering examples from around the world, like the right for Anglophones and Francophones in Canada to have laws enacted in their language.

Rodríguez, who grew up in a bilingual family in largely bilingual South Texas, began her work in the area of language rights as a Reginald F. Lewis Fellow at Harvard Law School during the 2001-2002 academic year. She pursued a range of writing projects on U.S. language law and policy while auditing classes at Harvard Law School. Last spring, as an Alexander Fellow at NYU, she taught a seminar on Language and Cultural Rights.

Rodríguez earned her B.A. in history *magna cum laude* from Yale, then went on to Oxford University as a Rhodes Scholar. She finished at Oxford with a Master of Letters in Modern History, writing her thesis on the role of trans-Atlantic female abolitionists in the development of anti-slavery beliefs in the United States.



After Oxford, Rodríguez returned to Yale for her J.D., where she served as articles editor of the *Yale Law Journal* and lent her time to the Yale Law School Workers’ Rights Project. Rodríguez worked as a professor’s research assistant for two years, investigating the history of desegregation and civil rights law and helping to revise portions of a constitutional law casebook.

Before coming to the Law School, Rodríguez was a law clerk for the Honorable David S. Tatel of the U.S. Court of Appeals, for the District of Columbia Circuit, and the

in the possibility of a bilingual public sphere and a non-monolingual conception of national, political, and cultural identity, and I’ve always been attuned to the ways in which people use language to identify social and economic status, as well as to establish effective ties.” At the Law School, Rodríguez hopes to continue her work in language rights while expanding her repertoire to include issues related to religious accommodation, international human rights, and immigration law.

Sally Engle Merry

A leading scholar in anthropology, law, and society, Sally Engle Merry has accepted a joint appointment to the Institute for Law and Society at the NYU School of Law and NYU’s Department of Anthropology. She will join the faculty in Fall 2005. Merry comes to NYU from Wellesley College where she was the Marion Butler McLean Professor in the History of Ideas and a professor of anthropology, as well as the co-director of the Peace and Justice Studies Program. She is the first faculty appointment to the Institute for Law and Society, a joint venture between the Faculty of Arts and Science and the Law School. As an innovative leader in the field, she will both increase the international and national reputation of the Institute and foster the intellectual environment of NYU faculty members with interests in law and society.

“Sally Merry’s appointment is a very important one for the Institute and for law and social science scholarship here at NYU,” said David Garland, Arthur T. Vanderbilt Professor of Law at the Law School. “Sally’s work is varied and wide-ranging, but she has a way of bringing cutting-edge theoretical approaches to bear upon issues that are of great public concern—and of discovering strategic sites in which these issues can be studied empirically. This, together with her capac-

“A big part of the draw to NYU is the city. The global dimension of the Law School is also very attractive. It’s just a really vibrant intellectual community.” —KEVIN DAVIS

Honorable Sandra Day O’Connor of the U.S. Supreme Court.

Rodríguez says she has always had an interest “in the effects of immigration on society and culture and on the strategies different societies adopt to absorb immigrant populations—hence the interest in how to manage linguistic diversity.” Because of this long-standing interest and her personal upbringing, she says, “I have always believed

ity to sustain a conversation across different disciplines, will make her a great addition to the NYU School of Law community and a real inspiration to the Institute’s students.”

Merry, who received her doctorate in anthropology from Brandeis University in 1978, has written extensively about the intersections between law and culture, law and colonialism, and law and international human rights. Her recent book, *Colonizing*

Hawai'i: The Cultural Power of Law (Princeton University Press, 2000), integrates and applies her long-term theoretical interest in legal pluralism. Merry has long argued for understanding the interrelation among multiple legal systems within a society, which is both especially evident and particularly



important in colonial societies. The book, which received the 2001 J. Willard Hurst Prize from the Law and Society Association, studies the legal systems and patterns of social control in Hawaii prior to its formal annexation. In *Getting Justice and Getting Even: Legal Consciousness Among Working Class Americans* (University of Chicago Press, 1990), Merry offered the first full-length study of the attitudes of litigants and judges in local district courts, small claims courts, and mediation services.

Exploring the discrepancy between the aims and aspirations of litigants and the treatment they receive in the courts, the book reveals widespread legal entitlement among working-class Americans, as well as a tendency for lower courts to deflect these claims and convert them into moral or psychological problems. In her first book, *Urban Danger: Life in a Neighborhood of Strangers* (Temple University Press, 1981), Merry focused on an ethnically mixed Boston community's response to and perception of crime, arguing that an individual's sense of danger is culturally mediated and shaped by perceptions of racial difference. Recently she completed a book called *Global Law: Women's Human Rights and the Meanings of Culture*. It examines the production of a global human rights law and its appropriation in several Asia/Pacific countries. She is currently launching a new National Science Foundation-funded research study on human rights and local legal consciousness based on case studies of women's use of human rights discourse in India, China, Nigeria, and Peru.

The author of nearly 100 scholarly articles and reviews, Merry's other books include *Law and Empire in the Pacific: Hawai'i and Fiji* (co-edited with Donald Brenneis, School of American Research Press, 2004) and *The Possibility of Popular Justice: A Case Study of American Community Mediation* (co-edited with Neal Milner, University of Michigan Press, 1993). She is past president of the Law and Society Association and the Association for Political and Legal Anthropology. Merry received her master's degree from Yale University in 1967, a year after she graduated from Wellesley College. ■

Visiting Faculty

Sir John Baker

A leading authority on the development of English legal institutions, Sir John Baker is the Downing Professor of the Laws of England at Cambridge University.

In addition to his appointment as a Senior Golieb Fellow at the Law School, Sir John was also a fellow of the British Academy in 1984 and a fellow of St. Catharine's College, Cambridge University, in 1971. He received the Ames prize from Harvard Law School, and an honorary LL.D. from the University of Chicago. The author of more than 25 books and 100 articles, Sir Baker is the general editor of the *Oxford History of the Laws of England* and general editor of the *Cambridge Studies in English Legal History*. He has held positions at Yale Law School, Harvard Law School, the Huntington Library, the University of Oxford, and the



European University Institute in Florence, Italy. He is returning to the NYU School of Law after serving on the Global Law Faculty. "It is a privilege to teach at one of the leading law schools in the United States, and to introduce selected stu-

dents to the legal heritage shared with England," he says.

Sir John was knighted in the Queen's Birthday Honours in June 2003 for his significant contributions to English legal history. A note from Parliamentary proceedings illustrates Sir John's prominence in British law: "In the matter concerning the attire of judges and barristers, Parliament shall make recommendations subject to the approval of Her Majesty, the Queen, and Dr. John Baker."

Stephen Choi

Stephen Choi, one of the nation's preeminent securities law scholars, is visiting from the University of California at Berkeley School of Law, where he is the Roger J. Traynor Professor of Law.

Choi's research combines creative theoretical work with empirical analysis of corporations and capital markets and the actual effect of securities law reforms. His numerous articles about the regulation of securities markets have appeared in a litany of prominent law review publications. Among his most notable recent published works are "How to Fix Wall Street: A Voucher Financing Proposal," *Yale Law Journal* (2003), and "Behavioral Economics and the SEC," *Stanford Law Review* (2003), with

Adam Pritchard. A number of his articles, including "The Unfounded Fear of Regula-



tion S: Empirical Evidence on Off-shore Securities Offerings," *Duke Law Review* (2000) and "Market Lessons for Gatekeepers," *Northwestern University Law Review* (1998), were recognized by the *Corporate Practice*

Commentator as among the best corporate and securities law articles of the year.

Much of Choi's current research uses empirical data to investigate whether it is possible to reduce frivolous private securities lawsuits without consequentially deterring worthy claims of fraud. "There is no magic bullet that can eliminate only frivolous litigation while allowing more meritorious suits to go forward," says Choi. He became interested in this issue after the Private Securities Litigation Reform Act was enacted in 1995, which, in an effort to reduce frivolous suits, raised the costs of litigating a securities claim.

Choi taught as an assistant professor at the University of Chicago Law School from 1996 to 1998, and he was a visiting professor at Yale Law School from 2000-2001. As a student at Harvard Law School, Choi was the supervising editor of the *Law Review*, and graduated first in his class in 1994. He is a recipient of the Fay Diploma, the Sears Prize, and the Irving Oberman Memorial Award. He received his Ph.D. in economics from Harvard University in 1997.

John Duffy

John Duffy is known for his unique perspective on the patent and trademark office. He is currently focused on reconciling the law



and economics of 20th century industrial regulations with those of 21st century intellectual property. "Much of the wisdom from this earlier body of legal and economic thought has direct and interesting applications to intellectual property," he says. More narrowly, he is interested

in the application of the patent system on pharmaceuticals.

Duffy wrote the casebook *Patent Law and Policy* (3rd ed. 2002), with Robert Patrick Merges and is most well known for his article, "Rethinking the Prospect Theory of Patents," *Chicago Law Review* (2004), which reexamines a traditional justification

for patent law and provides new insights into how the law operates to accelerate the time at which inventions reach the public. Another of his major articles, "Administrative Common Law in Judicial Review," *Texas Law Review* (1998), received the Annual Scholarship Award from the ABA Section on Administrative Law and Regulatory Practice.

A reputation as an exciting teacher has followed Duffy from the Cardozo School of Law to William and Mary Law School and to his current position on the faculty at George Washington University Law School. He was also a Visiting Professor of Law and an Olin Fellow in Law and Economics at the University of Chicago Law School. He is a former law clerk to the Honorable Stephen F. Williams, United States Court of Appeals for the District of Columbia Circuit, and to Justice Antonin Scalia of the U.S. Supreme Court.

William Eskridge Jr.

A long-time faculty member of the Law School's Institute for Judicial Administration, William Eskridge Jr., is now the John A. Garver Professor of Jurisprudence at Yale Law School.

His main areas of expertise are legislation; sexuality, gender and the law; civil procedure; and constitutional law. Eskridge is the co-author of the leading casebooks, *Legislation: Statutes and the Creation of Public Policy* (2001), with P.P. Frickey and E. Garrett,



now in its third edition, and *Sexuality, Gender, and the Law* (1997), with N.D. Hunter, now in its second edition. He has written several monographs, including *Dynamic Statutory Interpretation* (1994) and *The Case for Same-Sex Marriage* (1996).

He and Law School faculty member John Ferejohn are now working on a new monograph, *Super-Statutes*.

Professor Eskridge clerked with Judge Edward Weinfeld of the U.S. District Court for the Southern District of New York and served as an associate at Shea & Gardner before joining the University of Virginia Law School as an assistant professor in 1982. He moved on to Georgetown University Law Center from 1988 to 1998 before joining the faculty at Yale Law School. Eskridge has been a visiting faculty member at the law schools of NYU, Stanford and Yale as well as at Harvard University. He received his B.A. from Davidson College, his M.A. from Harvard, and his J.D. from Yale Law School.

Daniel Hulsebosch

Daniel Hulsebosch explores the ways in which legal culture integrates societies across space and time. He has traced the expansion of legal norms throughout the British Empire, into the American colonies,



and across the new states, bringing a new perspective to the field of English Legal History, which he will be teaching at the Law School this fall.

"I try to discover how migration itself changed the way people understood

what was meant by a constitution, as well as what they believed constitutions should provide and protect," Hulsebosch says.

Hulsebosch helped draft an amicus brief that was submitted to the Supreme Court in connection with a habeas corpus case from Guantanamo Bay. Signed by Law School Professor Michael Wishnie—the "motor force behind the brief"—and almost two-dozen other legal historians, the brief analyzed the question of whether the founding generation would have believed that the writ of habeas corpus extended to the military base at Guantanamo Bay. The most important service that a legal historian can provide, says Hulsebosch, is to offer guidance to decision-makers about the implications of legal history for current practice. He has also done research and consulting in relation to Native American land claims, which require scholars to interpret treaties and patents that date from the colonial or early national period, and which must be analyzed in the context they were written.

Hulsebosch wrote the book *Constituting Empire: New York and the Transformation of Constitutionalism in the Atlantic World, 1664-1830*, (University of North Carolina Press, 2003). He has also written articles on both Anglo-American constitutional history and 19th century private law. As a professor, Hulsebosch is known for his dynamic energy in the classroom. He was editor of the *Law Review* at Columbia University where he received his J.D., and received his A.M. and Ph.D. degrees from Harvard University.

Samuel Issacharoff

Samuel Issacharoff, the Harold R. Medina Professor in Procedural Jurisprudence at Columbia Law School, applies a diverse set of disciplines to the law, including economics, psychology, political science and game theory.

Issacharoff is a pioneer in the law of political process, and his casebook, *Law of Democracy* (Foundation Press, 2001), with

Richard Pildes and Pamela Karlan and articles in this field have contributed to the creation of a vibrant new area of constitutional law. Two of his most high-profile works, "Gerrymanders and Political Cartels," *Harvard Law Review* (2002), and "Politics as Markets: Partisan Lockups of the Democratic Process," *Stanford Law Review* (1998), with Richard Pildes, have been central to the evolving debate over democratic governance. Another article, "Governance and Legitimacy in the Law of Class Actions," *Supreme Court Review* (1999), touches on the area of law that he will be teaching this fall at the Law School.

A recently elected Fellow of the American Academy of Arts and Sciences, Issacharoff also serves as the reporter for the



newly created Project on Aggregate Litigation of the American Law Institute. He is a former clerk to the Honorable Arlin M. Adams of the United States Court of Appeals for the Third Circuit, and has also served on the Lawyers' Committee for International Human Rights and the Lawyers'

Committee for Civil Rights Under Law.

Professor Issacharoff was editor of the *Yale Law Journal*, where he received his J.D. in 1983. He is currently finishing a book on civil procedure for the Foundation Press Concepts and Insights series. He is also in the nascent stages of a large project on the use of constitutions to consolidate democratic government in ethnically divided societies. He is excited to visit the Law School because it "clearly has established itself as one of the most interesting and vibrant centers for serious inquiry into the issue of how to stabilize democratic governance in complicated and diverse settings."

Ehud Kamar

An associate professor at the University of Southern California Law School, Ehud Kamar will teach Corporations, Mergers and



Acquisitions, and Securities Regulation this spring.

Kamar began his legal career in Israel, obtaining his LL.B. (1991) and his LL.M. (1995) from the Hebrew University of Jerusalem. After graduating *summa cum laude* and first in

his class, he worked as a lieutenant prosecutor in military courts, dealing with more than 150 cases. He then went on to become captain,

deputy director of prosecution in the military court of appeals in Israel, supervising 20 prosecutors and evaluating appellate applications.

In 1996 he served as a Fulbright Scholar at the Columbia University School of Law, and subsequently a Lawrence A. Wien Fellow and a John M. Olin Fellow. He graduated from Columbia with an LL.M. in Corporate Law in 1998, and with a J.S.D. in 1999. Kamar joined the USC Law School faculty in 2000. A widely published scholar, Kamar is currently co-authoring *Price Discrimination in the Market for Corporate Law* with NYU Law Professor Marcel Kahan.

Kamar relishes his visiting professorship. "To teach corporate law in New York is like teaching cooking in Paris or samba in Rio de Janeiro."

William Novak

A leading scholar in U.S. legal and constitutional history, William Novak is a history professor at the University of Chicago. His focus is on issues of liberalism, state-building, and public law. This fall, he will teach the Administrative and Regulatory State and Readings in American Legal History at the NYU School of Law.

Until 2001, Novak was the director of the University of Chicago's Center for Comparative Legal History and was a founding member of the Human Rights Program. He is also a research fellow at the American Bar Foundation, where he co-edits the journal *Law and*

Social Inquiry. His first book, *The People's Welfare: Law and Regulation in Nineteenth-Century America*, documents the longstanding U.S. tradition of governmental activism, and won the American Historical Association's Littleton-Griswold Prize.

In a new book he expects to complete in 2006, *The Creation of the American Liberal State, 1877-1937*, Novak examines how the Western world evolved from a common-law state of self-regulation (what Novak calls a "well-regulated society") to its 20th century incarnation: a centrally regulated administrative state. "I'm very interested in the process through which the U.S. has become one of the most powerful legal-economic and geopolitical entities in world history while clinging to a political mythology that emphasizes individualism, private rights, and negative liberty," he said. "I think we need some new story-lines to make sense of the immense scale and scope of the American state in the early 21st century."

Novak received both his B.A. and M.A. in history from Case Western Reserve Uni-

versity, and his Ph.D. in History of American Civilization from Brandeis University. He balances academic interests with music. A co-founder of the Chicago folk group Hip

"To teach corporate law in New York is like teaching cooking in Paris or samba in Rio de Janeiro."

—EHUD KAMAR

Fetish, he has played "Happy Birthday" for Chicago Mayor Richard Daley and "Hail to the Chief" for President Bill Clinton. "If I have any time after meeting and becoming familiar with the writings and research interests of the members of this community, I would want to take in as much live music as possible," says Novak.

Nathaniel Persily

A renowned expert on election law, Nathaniel Persily was in high demand as a commentator during the 2000 election. He has drawn districts for the Georgia House of Representatives and Senate, the legislative districts of Maryland State, and the congressional districts of New York State. He also served as an expert witness for the 2002 reevaluation of the California State

Senate and Congressional redistricting plans, and was outside counsel to the Miami-Dade County Attorneys Office involving their 2000 redistricting process.

The NYU School of Law is a familiar institution to Persily, as he was an associ-



ate counsel at the Law School's Brennan Center for Justice from 1999-2001. While there, he represented Senator John McCain in a challenge to the New York Republican primary ballot access rules, and co-wrote amicus briefs in *Bush v. Gore* and *California Democratic Party v. Jones*. Persily also worked on the Democracy Program, focusing on issues of census policy, legislative redistricting, representation, ballot access, and legal regulation of the political process through scholarship, conferences, litigation, and policy analysis.

In 2002, Persily enlisted his Constitutional Law class to assist him in writing a Supreme Court amicus brief in *Utah v.*

Evans, a case challenging the 2000 Census "imputation" process used in creating apportionment totals. He is also a widely published writer on the topics of legal regulation of political parties and the 2000 Census and redistricting process.

At the Law School, Persily will teach Contemporary Issues in Law and Politics, which "deals with hot topics in the law, such as terrorism, gay marriage, affirmative action, and issues surrounding the upcoming election." He will also be working on two articles on campaign finance reform, one on redistricting, one on the census, and one on direct democracy. With this heavy workload, Persily is hoping for some good luck to see him through. "As a specialist in election law, I may be quite busy in the months leading up to November 2," he said. "Let's just hope that the election ends on that date this time."

Roberta Romano

The Alan Duffy/Class of 1960 Professor of Law at Yale Law School, Roberta Romano is an internationally prominent corporate-law scholar, focusing particularly on the dynamics of American corporate law.

One of her books, *The Genius of American Corporate Law* (1993), about the decentralized structure of American corporate law, was a landmark in scholarship. She is also the author of *The Advantage of Competitive Federalism*



for Securities Regulation (2002) and *Foundations of Corporate Law* (1993).

Romano is an empiricist who has conducted a number of sophisticated studies of the characteristics and effectiveness of American corporate law. In one of her most renowned articles, "The Shareholder Suit: Litigation Without Foundation?" *Journal of Law, Economics and Organization* (1992), Romano studied the effectiveness of shareholder litigation and found, rather surprisingly to many in her field, that it is difficult to find any beneficial consequences of that system.

Romano's "Empowering Investors: A Market Approach to Securities Regulation," *Yale Law Journal* (1998), called for interjurisdictional competition in securities regulation, both domestically and internationally. This article has been reprinted in several other prominent publications, and was selected as one of the 10 best corporate and securities Articles for 1998 by a *Corporate Practice Commentator* annual poll. She was selected for this honor again in 2001 for her article, "Less is More: Making Institutional Investor Activism a Valuable Mechanism of Corporate Governance," *Yale Journal on Regulation* (2001).

Romano received the Yale Law Women Teaching Award in 1997. She arrived at Yale from Stanford Law School and served as a law clerk to the Honorable Jon O. Newman, United States Court of Appeals for the Second Circuit. As a student at Yale Law School, where she received her J.D. in 1980, Romano was note editor of the *Law Journal*. She received her M.A. from the University of Chicago in 1975.

Herwig Joachim Schlunk

A professor of law at Vanderbilt University Law School, Herwig Schlunk will be teaching Federal Income Tax at the Law School this spring. His scholarship has focused primarily on corporate taxation, and he is looking forward to spending a semester in New York City.

“For a tax person, what doesn’t attract me to NYU?” Schlunk said. “NYU has a very good tax faculty, it’s located in a city which has by far the most advanced tax-practitioner base in the country, and in the spring it has the best tax colloquium in the country.”

Prior to teaching at Vanderbilt, Schlunk was Director of Mergers and Acquisitions at Koch Industries in Wichita, Kansas. He spent



several years at Kirkland & Ellis in Chicago, first as an associate and later as a partner in the tax department, where he specialized in mergers and acquisitions, principally those involving private equity. He spent more than a year in

Germany as a German Ministry of Justice fellow studying comparative law, and then as an exchange attorney practicing at Bruckhaus, Westrick & Stegemann in Dusseldorf, and Boden, Oppenhoff, Rasor & Raue in Cologne.

Schlunk also spent a year as a law clerk to Judge Richard A. Posner before teaching as an adjunct at the Chicago-Kent College of Law.

Of his New York sojourn, Schlunk had this plan in mind: “Part of my time will be spent teaching, part will be spent going to colloquia, and part of my time will be spent going to the Metropolitan Opera as often as I can,” he said. “Provided that I can find other faculty members to go with me, which I imagine I can.”

David Shapiro

David Shapiro, the William Nelson Cromwell Professor of Law at Harvard Law School, will spend this spring at the NYU School of Law. This is his fourth semester visiting, and he plans to teach Introduction to the American Judicial System: Civil Procedure.

Shapiro’s research has centered on federalism, civil procedure, and statutory interpretation. He obtained his B.A. and LL.B. from

Harvard, and went on to work as an associate attorney at Covington & Burling. After clerking for U.S. Supreme Court Justice John M. Harlan in 1962, Shapiro returned to Harvard Law School as an assistant professor, rising to



professor in 1966, and has held his current post since 1984. He was also associate dean of Harvard Law School from 1971 to 1976. From 1988 to 1991, Shapiro served as Deputy Solicitor General in the U.S. Justice Department, which

gave him “the opportunity to brief and argue a wide range of challenging and important cases in the Supreme Court, and to learn firsthand something of the incredibly complex operations of the federal government.”

Shapiro has taught at schools around the country, including the University of Pennsylvania Law School, Stanford Law School, the University of Arizona James E. Rogers College of Law, and University College at Oxford. But the NYU School of Law holds a special place: “The school has become an important part of my professional life,” Shapiro said, “and I especially enjoy renewing on each visit the many friendships I have made there and participating in the consistently interesting and valuable colloquia that are so much a part of the institution.”

Geoffrey Stone

A preeminent scholar on the First Amendment, Geoffrey Stone, the Harry Kalven Jr. Distinguished Service Professor of Law at the University of Chicago Law School, will visit the NYU School of Law this fall. He has taught many courses on constitutional law, civil procedure, evidence, criminal procedure, contracts, and regulation of the competitive process.

Stone’s current research is focused on civil liberties in wartime. In the past, he has researched such subjects as freedoms of speech, press, and religion; the constitutionality of police use of informants, the privilege against compelled self-incrimination; the Supreme Court; and the F.B.I. Last October, Stone was the



primary author of an amicus brief to the Supreme Court arguing that the executive detentions of prisoners in Guantanamo Bay is unconstitutional. The brief was filed on

behalf of Fred Korematsu, who challenged the constitutionality of the internment of Japanese-Americans during World War II and is represented by Stephen Schulhofer, the Robert B. McKay Professor of Law.

A graduate of the University of Pennsylvania’s Wharton School, Stone obtained his law degree from the University of Chicago Law School. He then went on to serve as a law clerk to Judge J. Skelly Wright of the U.S. Court of Appeals for the District of Columbia, and Justice William J. Brennan Jr. of the U.S. Supreme Court. He returned to the University of Chicago Law School as a professor in 1973, and served as its dean from 1987 to 1993. From 1993 to 2002, he was provost of the University of Chicago. The author or co-author of numerous books, Stone’s latest, *Perilous Times: Free Speech in Wartime From the Sedition Act of 1798 to the War on Terrorism*, hit bookstore shelves in November 2003.

Mark Tushnet

Mark Tushnet, the Carmack Waterhouse Professor of Constitutional Law at the Georgetown University Law Center, spent last spring at the NYU School of Law and returns again



this fall. Over the past year he completed numerous essays on comparative constitutional law, which he plans to incorporate into both his course in the fall and the book he is writing.

Tushnet helped to develop the discipline of Critical Legal Studies in the 1970s and 1980s. He served as secretary of the

Conference on Critical Legal Studies from 1976 to 1985, and continues to use the Critical Legal Studies tradition in his scholarship.

Tushnet has co-authored three casebooks: *Federal Courts in the 21st Century: Cases and Materials* (2nd ed. 2002); *Constitutional Law* (4th ed. 2001); and *Comparative Constitutional Law* (1999), the first casebook in a generation on comparative constitutional law.

After receiving his B.A. from Harvard and his M.A. and J.D. from Yale, Tushnet served as a clerk to U.S. Supreme Court Justice Thurgood Marshall. He then became a member of the law faculty of the University of Wisconsin at Madison until joining the Law Center faculty at Georgetown in 1981. He is the 2003 president of the Association of American Law Schools.

Tushnet’s previous visit leaves him relishing the fall: “My [Regulatory State class] pushed me hard in ways that improved the course,” he says. “The intellectual environment at the Law School, particularly in the areas of comparative constitutional law and European law, was extremely stimulating. And, of course, the food and theater in New York was terrific.”

Albert Yoon

Albert Yoon will be visiting the Law School this fall from Northwestern University, where he serves as an assistant professor of law. He spent the past year as a fellow at Princeton University, writing a book about tort reform. His diverse expertise includes tort reform, corporate and securities law, federal courts, political parties and federalism, local government law, and juvenile justice.

Yoon is drawn to the Law School because it is at the “forefront of interdisciplinary research, and because it attracts a student body that contributes to the intellectual exchange of ideas in the classroom, creating an environment where professors often learn as much as their students.”

Some of Yoon’s most notable publications include “Mandatory Arbitration and Civil Litigation: An Empirical Study of Medical Malpractice Litigation in the West,” *American Law and Economics Review* (2004); “Love’s Labor’s Lost: Judicial Tenure among Lower Federal Court Judges,” *California Law Review* (2003); and “The Consequences of National Parties and Corporate Money for ‘Political Safeguards,’” *Northwestern University Law Review* (2002).

After receiving his J.D., Yoon served as a clerk to the Honorable R. Guy Cole Jr., of the U.S. Court of Appeals for the Sixth Circuit, and then went on to conduct research on civil litigation as a Robert W. Johnson Scholar at U.C. Berkeley in 1999. Yoon received his M.A., J.D. and Ph.D. from Stanford University. He was the senior articles editor of the *Stanford Law Review*, and acted as a



consultant in the criminal justice division of the Rand Corporation, analyzing federal and state truth-in-sentencing policies. ■

Faculty in Residence

Charles M. Cameron

A prize-winning scholar of American politics, Charles Cameron comes to the Law School from Princeton University, where he is a professor of politics and public affairs. His research focuses on political institutions and policymaking, and his work has appeared in journals of political science, economics, and law.

His book, *Veto Bargaining: Presidents and the Politics of Negative Power* (Cambridge University Press, 2000), won the American

Political Science Association’s Fenno Prize for best book in legislative studies, and the Riker Award for best book in political economy. The article he co-authored, “Do Majority-Minority Districts Maximize Black Substantive Representation in Congress?” was cited in *Ashcroft v. Georgia*, a major redistricting case in the Supreme Court last year.



Since completing fellowships at the Hoover Institution and the Brookings Institution, Cameron is now a scheduled fellow at the Center for the Advanced Study in the Behavioral Sciences at Stanford University. He received his M.P.A. and Ph.D. from the Woodrow Wilson School of Public Service and International Affairs at Princeton University. Before joining the Princeton faculty, Cameron served as director of the M.P.A. program at Columbia University, where he was a tenured professor in the department of political science. At the Law School, Cameron looks forward to exchanging ideas with his NYU colleagues. “Many of the faculty enjoy perspective from the social sciences and are generous in sharing their expertise with social scientists,” he says. “From an intellectual perspective, the NYU School of Law possesses an extraordinarily deep bench.”

John Monahan

The leading scholar of violence risk assessment, John Monahan is the Henry and Grace Doherty professor, professor of psychology and psychiatric medicine, and Class of 1941 research professor at the University of Virginia School of Law. At the Law School this year, he plans to study the use of social science



research by courts, and the legal regulation of treatment for mental disorder.

Monahan has also been a visiting scholar at the American Academy in Rome, Harvard Law School, All Souls College, and Oxford University. He has been a Guggenheim Fellow, and has held fellowships at the Center for Advanced Study in the Behavioral Sciences, Stanford Law School, and Harvard Law School. The founding president of the American Psychological Association’s Division of Psychology and Law, Monahan is also a two-time winner of the Manfred Guttmacher Award of

the American Psychiatric Association for his books *The Clinical Prediction of Violent Behavior* (1982) and *Rethinking Risk Assessment* (2002). Monahan has won the Isaac Ray Award of the American Psychiatric Association, and received an honorary Doctorate of Law from the City University of New York. He was elected a member of the Institute of Medicine of the National Academy of Sciences, and served on the National Research Council’s Committee on Law and Justice. He also serves as a reporter

“From an intellectual perspective, the NYU School of Law possesses an extraordinarily deep bench.”

—CHARLES CAMERON

on the Committee on Rights and Engagement for the President’s New Freedom Commission on Mental Health, and is a member of the National Scientific and Policy Advisory Council of the Hogg Foundation for Mental Health.

Formerly the director of the MacArthur Foundation’s Research Network on Mental Health and the Law, Monahan currently directs the Foundation’s Research Network on Mandated Community Treatment. His findings have been used in various state and U.S. Supreme Court cases. He has been awarded a MacArthur grant to study the legality of requiring people with mental disorders to receive treatment in the community. “With its unquestioned strengths in criminal justice and social welfare,” Monahan says, “NYU is an ideal place to examine how law is used as leverage to regulate behavior.”

Seana Shiffrin

A professor at the School of Law and the Department of Philosophy at UCLA, Seana Shiffrin is also an associate editor of *Philosophy and Public Affairs*. Her research encompasses the First Amendment, Contracts, Substantive Jurisprudence, Ethics, Political Philosophy, and Intellectual Property Theory.

Shiffrin received her J.D. *magna cum laude* from Harvard Law School, where she was an editor of the *Harvard Law Review*. Her bachelors and doctorate degrees, both in philosophy, came from Oxford University, where she was a Mar-

shall Scholar specializing in political and moral philosophy. As an undergraduate at the University of California at Berkeley, Shiffrin was awarded a medal as the most distinguished student.

A widely published writer, her research has appeared in the *NYU Law Review* and *Constitutional Law Stories*. She looks forward to visiting the Law School: "NYU has a wonderful faculty and I especially enjoy the prospect of interacting with the faculty who work on constitutional law, jurisprudence, intellectual property and contracts." While in residence, Shiffrin will spend her time writing and reading for a few projects about freedom of association, intellectual property and incentives, and the relationship between contracts and promises.

Barry Weingast

An expert in U.S. politics, regulation, political economy and public policy, and the political foundation of markets and economic reform, Barry Weingast is the Ward C. Krebs Family Professor in the Department of Political Science at Stanford University.

Weingast is also a Senior Fellow at the Hoover Institution, as well as a fellow of the American Academy of Arts and Sciences.



His residence in New York this fall presents new interdisciplinary opportunities. "NYU is one of the most exciting law schools in the country, and there is a significant interest in social science and the use of economics and

political science to study aspects of law," Weingast says.

A former fellow at the Center for Advanced Study in the Behavior Sciences, Weingast is a prolific writer who has received numerous awards for his work. *The American Political Science Review* awarded him the Heinz Eulau Award for Best Paper in 1987, and, with Charles Stewart, he received the Award for Best Paper in Political History from the American Political Science Association in 1994 and 1998. Along with Kenneth Schultz, he also received the Franklin L. Burdette Ward for Best Paper Presented at the 1994 Political Science Association Meeting. Weingast's most recent papers are "The Self-Enforcing Constitution: With an Application to Democratic Stability in America's First Century" and "The Political Economy of Law" with McNollgast, forthcoming in the *Handbook of Law and Economics*, edited by A. Mitchell Polinsky and Steven Shavell.

James White

James White is professor emeritus at Indiana University, Indianapolis and also consultant emeritus on Legal Education to the American Bar Association. His scholarship focuses on comparative law and the legal profession.



Formerly dean for Academic Planning and Development at Indiana University—Purdue University Indianapolis, White also served as special assistant to the chancellor. At the University of North

Dakota School of Law, White served as an assistant professor and director of the Agricultural Law Research Program before moving up to assistant dean. He received his B.A. and J.D. from the University of Iowa, and his LL.M. from George Washington University. He completed a Carnegie Post-Doctoral Fellowship in University Administration at the University of Michigan, Ann Arbor.

White holds honorary degrees from a dozen schools and has received a variety of awards, including the Texas-St. Thomas More Award from St. Mary's University in San Antonio, Texas; the Thomas M. Cooley Law School's Louis A. Smith Distinguished Jurist Award; and the Kutak Award Medal from the American Bar Association Section of Legal Education and Admissions to the Bar.

A member of the *Iowa Law Review's* Board of Editors, White is also a life fellow of the American Bar Foundation and the Indianapolis Bar Foundation, as well as a member of the Order of the Coif. He is an honorary fellow of the Society of Advanced Legal Studies in the United Kingdom, and has served as chairperson of the Fulbright Awards in Law Committee and secretary of the American Bar Association Section of Bar Activities. White is a trustee of the Indianapolis Museum of Art, the John Marshall Law School in Atlanta, and Butler University in Indianapolis. ■

Alexander Fellow

Youngjae Lee

Alexander Fellow Youngjae Lee returns to the NYU School of Law this year to complete the second half of his fellowship. Lee spent his first year writing an article examining the concept of proportionality in the Supreme Court's recent jurisprudence on excessive punishments. This year he will look at the Court's articulation of the distinction between punishment and regulation in various contexts. His research and teaching will intersect in



the spring seminars when he plans to teach Criminal Law Theory and the Constitution.

Comparative constitutional law also piques Lee's interest, as he is actively focusing on the Constitutional Court of Korea

and its increasingly important role in South Korean society.

Lee earned his B.A. with high honors majoring in philosophy with a minor in economics from Swarthmore College, where he was elected to Phi Beta Kappa. He was a Fulbright Scholar at the Department of Philosophy of Seoul National University before attending Harvard Law School, where he was an editor of the *Harvard Law Review*, a recipient of the Heyman Fellowship for government service, and a *magna cum laude* graduate. Lee served as a law clerk for Judge Judith W. Rogers of the U.S. Court of Appeals for the District of Columbia Circuit. He was an attorney in the Federal Programs Branch of the Civil Division in the U.S. Department of Justice, and at Jenner & Block in Washington, D.C.

An active participant in the Law School's colloquia, Lee says, "In every encounter, I am struck not only by the intellectual richness of the discussions, but also by the supportive and welcoming atmosphere among the faculty, which has certainly made the process of integration into the academic community a real pleasure."

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Brian Arnold



Sabino Cassese



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Niva Elkin-Koren



Franco Ferrari

Hauser Global Law Faculty

Brian Arnold

Brian Arnold is with Goodmans LLP, Toronto, and is a professor emeritus at the Faculty of Law, University of Western Ontario, where he taught tax law for 28 years. A graduate of Harvard Law School, he is a consultant to the Canadian Department of Finance and the Office of the Auditor General, and is currently an adviser to the Organization for Economic Cooperation and Development, the Australian Taxation Office, and the South African Revenue Service. He teaches international tax courses at Harvard Law School and the Faculty of Law, University of Sydney. He has written widely on tax matters and is a member of the Permanent Scientific Committee of the International Fiscal Association.

Gráinne de Búrca

Gráinne de Búrca is professor of European Union law at the European University Institute and co-director of the Academy of European Law in Florence, Italy. Previously, she was a university lecturer in law at Oxford and a fellow of Somerville College. She studied law at University College Dublin and the University of Michigan, and has been a visiting professor at the University of Toronto, University of Michigan, and Columbia Law School. She has co-authored and co-edited a number of books in the field of European Union law, and her research has focused primarily on constitutional issues of European integration. Her recent research has included projects on the European Union in the World Trade Organization, human rights law and policy in Europe and especially in the European Union, law and civil society in the context of global economic governance, and the changing modes of governance in Europe.

Sabino Cassese

Sabino Cassese is professor of administrative law at the University of Rome-La Sapienza. Previously, he was director of the Institute of Public Law at the University. He has also held public office, having served in the Italian government as minister for public administration. A prolific scholar and prominent figure in the European legal academy, he has published many books and articles. His areas of interest include the history of administrative law, the

role of independent administrative authorities, and the administrative structure of the European Union. He has frequently been a visitor to law schools and research centers in the United States, United Kingdom, and France.

Olivier De Schutter

Since joining the University of Louvain in Belgium in 1993, Olivier De Schutter has been working at the intersection of human rights, issues of governance, and globalization. In 1992-93, De Schutter set up the delegation to the European Union of the International Federation of Human Rights (FIDH), an international non-governmental organization now comprising 142 human rights organizations worldwide. He was involved in drafting the E.U. Charter of Fundamental Rights (1999-2000) and is coordinating the E.U. Network of Independent Experts on Fundamental Rights, which he established at the request of the European Commission and the European Parliament to monitor compliance with the charter by E.U. institutions and member states. He has written extensively on the European Court of Human Rights, where he has litigated on several occasions. De Schutter is preparing a book on globalization and human rights and also is editing a book on the relationship between social rights and the internal market. He has written extensively on the United States Supreme Court, especially on the promises of public law litigation and what it could mean for the European Courts.

Niva Elkin-Koren

Niva Elkin-Koren is a senior lecturer at the University of Haifa School of Law and a co-director of the Haifa Center for Law & Technology. Her research focuses on the legal institutions that shape the information environment. She has written and spoken exten-

sively about the privatization of information policy, copyright law, and democratic theory; the effects of cyberspace on the economic analysis of law; the regulation of search engines; liability of information intermediaries; and the significance of the public domain. She is co-editor of *The Commodification of Information* (Kluwer Information Law Series, 2002) and this year published "Law, Economics, and Cyberspace: The Effects of Cyberspace on the Economic Analysis of Law" (co-authored with Eli M. Salzberger).

She received her LL.B. from the Tel-Aviv University School of Law, her LL.M. from Harvard Law School, and her J.S.D. from Stanford Law School.

Franco Ferrari

Franco Ferrari is chaired professor at Verona University School of Law. Previously, he was chaired professor at Tilburg University in the Netherlands and the University of Bologna in Italy. After serving as member of the Italian delegation to various sessions of the United Nations Commission on International Trade Law (UNCITRAL), he served as legal officer at the U.N. Office of Legal Affairs, International Trade Law Branch, with responsibility for numerous projects, including the preparation of the UNCITRAL Digest on Applications of the U.N. Sales Convention. Ferrari has published more than 120 law review articles in various languages and nine books in the areas of comparative law, private international law, and international commercial law. He is a member of the editorial board of various peer-reviewed European law journals (*Internationales Handelsrecht*, *European Review of Private Law*, *Contratto e impresa*, *Revue de droit des affaires internationales*) and also acts as an international arbitrator.

Dieter Grimm

Dieter Grimm is a permanent fellow at the Institute of Advanced Study in Berlin and a former judge of the Federal Constitutional Court of Germany. After receiving his law degree from the University of Frankfurt in 1962, Grimm continued his legal studies at the University of Paris and Harvard Law School, where he obtained an LL.M. in 1965. For many years prior to his judicial appointment in 1987, Grimm was professor of public law at the University of Bielefeld, Germany, and director of the university's Center for Interdisciplinary



Dieter Grimm



Yasuo Hasebe



Martti Koskenniemi



Michael Lang



Ruth Rubio-Marín

Research. He has published extensively in German and English, and has been a visiting professor at Yale Law School and a distinguished global fellow at the NYU School of Law.

Yasuo Hasebe

Yasuo Hasebe is professor of law at the University of Tokyo, Japan. He specializes in jurisprudence, constitutional law, and information law, and has published extensively in English and Japanese. Hasebe is an active contributor in the International Association of Constitutional Law and the Society for Advanced Legal Studies.

Martti Koskenniemi

Martti Koskenniemi, recently elected to the International Law Commission, has been counselor for legal affairs at the Ministry for Foreign Affairs of Finland, a position he held since 1989. In addition, he has represented Finland on the General Assembly and on the United Nations Security Council. He also has been an active litigator on the International Court of Justice, serving as co-agent of Finland in the case concerning passage through the Great Belt. Despite a busy career in international diplomacy, Koskenniemi has found time to write extensively. He has published three books and more than 50 articles and book reviews. He holds a doctor of laws degree from the University of Turku, where he also earned his LL.B. and LL.M., and a diploma in law from Oxford University.

Michael Lang

Michael Lang is a professor at the Vienna University of Economics and Business Administration in Austria where he created and directs a graduate program in international tax. He serves as head of the Department of Austrian and International Tax Law. He is also a member of the Permanent Scientific Committee of the International Fiscal Association and the Academic Committee of the European Association of Tax Law Professors. He has an extensive record of publications and is widely regarded as a major figure in the international tax field.

Ruth Rubio-Marin

Ruth Rubio-Marin is associate professor of constitutional law at the University of Seville, Spain. She has held several visiting positions in North America, having been a visiting scholar at the University of California School of Law at Berkeley, fellow at Princeton University, visiting professor at Queen's University in Canada, and adjunct professor at Columbia Law School. She has published three books and several articles and chapters, and presented papers at conferences in Europe and North America. Her primary research interests are immigration law and policy, citizenship theory, nationalism, language rights, and minority rights. ■

Furman Academic Fellows 2004-05

Kim Barry ('98)

The first Furman Fellow at the NYU School of Law, Kim Barry spent the last year researching the legal and political dimensions of citizenship and international migration.

Now in her second year, she is in the process of analyzing citizenship in "sending states," those developing countries where many citizens reside in other more developed nations. Her paper on this topic, "Home and Away: the Construction of Citizenship in an Emigration Context," was selected for presentation at the 2004 Annual Meeting of the Canadian Association of Law Teachers and the Canadian Association of Law and Society in conjunction with the Law Commission of Canada. It will be published in French and English by UBC Press.



Barry graduated *magna cum laude* with a J.D. from the Law School. She was a member of the Order of the Coif, an articles editor at the *NYU Law Review*, and a Dean's Scholar. In addition to being a Katz Fellow and associate counsel at the Brennan Center for Justice at the NYU School of Law, Barry was also an Arthur Garfield Hays Civil Liberties Fellow.

After studying at the Graduate Institute of International Studies in Geneva, Barry went on to receive her M.A. from the Fletcher School of Law and Diplomacy and her B.Sc. from Georgetown University School of Foreign Service. She worked as an associate at Perkins Coie in Seattle, and clerked for Judge Betty Fletcher of the U.S. Court of Appeals for the Ninth Circuit.

Her other research interests include public international law, immigration law, and family law.

Terry Maroney ('98)

Terry Maroney lives by the words of her late friend, American University Professor Peter Cicchino: "As I have struggled with the question of what makes a good and



happy human life, I have become ever more convinced that struggling to secure the conditions for a decent human life for others is a large part of the answer." After receiving her B.A. in Women's Studies and English from Oberlin College, she worked at

New York Women Against Rape, NENA Health Center, and the NYC Gay and Lesbian Anti-Violence Project.

Graduating *summa cum laude* with a J.D. from the NYU School of Law in 1998, Maroney was a Root-Tilden Scholar and a member of the Order of the Coif. She

received numerous awards including the Law Review Alumni Association Award for achieving the second-highest grade point average in the class and the Frank H. Sommer Memorial Award for outstanding scholarship, character, and professional activities. She was also notes editor-development for the *Law Review*, a member of the Latino Law Students Association, and founder and director of the Cuban Legal Studies Group at the Law School. After graduating, she clerked for Judge Amalya Kearse of the U.S. Court of Appeals for the Second Circuit.

As a Skadden Public Interest Fellow, Maroney worked at the Urban Justice Center in New York City. She also designed and taught an undergraduate course, Law & Urban Problems, at the NYU Metropolitan Studies department. Afterward she became a litigation associate at the New York office of Wilmer Cutler & Pickering.

Now Maroney returns to academia. "The fellowship is a gift of space and time for me to prepare for this next stage of my career as an academic, and I am grateful for it. My friends and colleagues are terribly jealous: a whole year to research and write!"

Margaret Lemos ('01)

Margaret Lemos obtained her J.D. from the NYU School of Law, and then clerked for Judge Kermit V. Lipez of the U.S. Court of



Appeals for the First Circuit in Portland, Maine. She served as a law clerk and then as a Bristow Fellow in the Office of the Solicitor General in the U.S. Department of Justice, and spent last year clerking for Justice John Paul Stevens of the U.S. Supreme Court.

Before coming to NYU, Lemos graduated *magna cum laude* and with honors from Brown University, where she received the Philo Sherman Bennett award for best thesis in political theory.

At the Law School, she was a member of the Order of the Coif and served as senior notes editor of the *Law Review*. She received a Dean's Scholarship covering full tuition and fees, and served as a research assistant to Professors Ronald Dworkin and Larry Kramer and as a teaching assistant to Professor Helen Hershkoff. Lemos graduated *summa cum laude* in 2001, receiving the Law Review Alumni Association Award for the third-highest grade-point average and the Benjamin F. Butler Memorial Award for unusual distinction in scholarship, character and professional activities as well as others.

Excited to return to an academic setting, Lemos says, "One of the things that I valued most about my time at NYU was the opportunity to talk with the faculty and my fellow students about the issues that interest me most. The Furman Fellowship will give me the opportunity to get back to what I really like about the law."

Gillers Steps Down as Vice Dean After Five Years

After five years of tireless dedication, Vice Dean Stephen Gillers ('68) stepped down from his post at the end of the 2003-04 academic year to return, as planned, to full-time teaching and research as the Emily Kempin Professor of Law.

In paying tribute to Gillers, Dean Richard Revesz said the vice dean "brought to his position a terrific determination to work with faculty, administrators and students to resolve academic and personal problems. Steve is a



Stephen Gillers ('68)

great leader and colleague, and I cannot imagine how I would have been able to manage my transition to the deanship without his guiding hand."

The vice dean oversees the academic program at the Law School—determining the courses for the

upcoming year, negotiating the teaching schedule with an extensive faculty, and filling in holes in the curriculum when faculty are on sabbatical. In addition to those gargantuan tasks, he plays a large role in advising students.

Oscar Chase, Russell D. Niles Professor of Law and co-director of the Institute of Judicial Administration, who served a term as vice dean before Gillers, listed his successor's achievements: reducing the size of first-year classes, modernizing the first-year curriculum, and implementing a block schedule. "He played an extremely important role after September 11, 2001, holding the community together when everyone was paralyzed with shock and sorrow," Chase said. "Steve really stepped up to the plate during those difficult days, weeks, and months." Throughout his tenure, Gillers maintained a role as a public commentator on the important ethical issues of the day (please see his opinion piece in *The New York Times*, right), while continuing to be an outstanding professor, scholar, and colleague.

Gillers said he was continually helped by his talented staff, whom he thanked for their dedication. "This is a nice place to be," he said. "Much of what [former dean, now NYU president] John Sexton meant when he talked about community is this idea that despite the occasional slip, the place is full of good people who set an example for its students by being respectful. Community not only defines what we have, but what we are constantly trying to build—what we aspire to."

Dean Revesz announced that two of the Law School's most distinguished faculty would replace Gillers. Barry Adler, the

Charles Seligson Professor of Law, will focus on information systems and technology, the law library, matters relating to student discipline, class scheduling, and any issues pertaining to the requirements of the American Bar Association, the New York Court of Appeals and the New York State

Regents. Clayton Gillette, the Max E. Greenberg Professor of Contract Law, will assume responsibility for programs concerning the intellectual life of the Law School, relations with the University that affect Law School students and faculty, and guidance for some of the Law School's publications. ■

Reprinted from

The New York Times

Make a List

By Stephen Gillers

Politics and ideology are often blamed for giving us poor judges. But neither can be removed from the judicial selection process. The trick is to devise a system that limits their influence.

Discontent with the current system is evident nationally and locally. In the Senate, Democrats have accused President Bush of choosing nominees with right-wing views at odds with fair judging. In Brooklyn, the Democratic Party's near total control over ballot access is said to have led to the election of mediocre state judges of suspect integrity but undoubted party loyalty and the exclusion of capable but politically unconnected lawyers.

Courts are not free of ideology. In exercising their discretion, judges must make choices based on their beliefs about the law, which is another way of saying ideology. Just last year the Supreme Court recognized the relevance of ideology to judging when it ruled that candidates for elective judicial office have a First Amendment right to tell voters their views on disputed legal or political issues.

Politics, too, plays a role in judging. Politics must never influence a judge's decision, but it cannot be removed from the process that selects judges. Instead, we should encourage the right kind of politics. Lawyers who are engaged in their communities will be better judges for the experience. On the other hand, political activity that is merely party fealty, like fund-raising, is no qualification at all.

But neither ideology nor political activity should be the sole, or even the main, criterion in choosing judges. Otherwise, men and women will serve on the bench who may be ideologically or politically acceptable to those who choose them. Yet they may lack other attributes—like independence, intelligence, energy, an open mind and recognition of the importance of the position and public confidence in it.

Do these qualities seem abstract? Perhaps they are, unless you happen to be in court on a case that can change your life. Then the last thing you want to hear is that the judge got appointed as a reward for political loyalty.

Luckily, there is a better model for judicial selection. Although the Constitution gives the president the power to pick all federal judges, senators have long had great influence in the choice of the federal trial judges who sit in their states. For decades, New York's Republican and Democratic senators have appointed judicial screening panels, composed of members of the community, not limited to lawyers, and charged them to recommend candidates for the federal trial courts in the state. Any lawyer can apply for a judgeship.

For each vacancy, the panels compile a list from which the senator can then recommend a nominee to the president. This tradition has given New York an excellent federal trial bench. Lawyers who would be excluded from consideration in a world that demanded political loyalty or ideological devotion have been willing to submit their names.

With some modification, the same system can work for selecting appeals court nominees and a political party's candidates for elected judgeships. Working with the Senate, the president could convene a screening panel of lawyers and community leaders for each appellate vacancy and choose a nominee from among the recommendations. Governors who appoint state judges, and political parties that nominate judicial candidates, could do the same. The idea could even work for Supreme Court openings.

True, even a system that overvalues a particular ideology or party service can produce some good judges through plain luck. But luck is not good enough. The system should be designed to create the best chance of getting the best judges. An inclusive plan that promises all lawyers fair consideration by a credible screening panel is much more likely to reach that goal. Certainly, candidates who emerge from this process will inspire greater confidence on the Senate floor and in the voting booth.

Originally published in *The New York Times* on June 11, 2003.



J.S.D. program director Mattias Kumm, left, with Dean Richard Revesz and J.S.D. candidate Christine Bateup.

J.S.D. Candidates Present Their Work at 'Turn to Scholarship' Conference

A different sort of student conference was held at Furman Hall last January, as candidates for the Doctorate of Juridical Science (J.S.D.) degree presented their research to fellow students and leading academic figures in their fields of study.

Each year, the NYU School of Law admits a small number of academically outstanding students to candidacy for the J.S.D. degree, enabling them to produce a dissertation that will represent a significant and valuable contribution to legal scholarship in their chosen field. There are currently 25 students in the program, which is the legal equivalent to the Ph.D. in the arts and sciences. The research being undertaken by J.S.D. candidates is extremely diverse, ranging from international law, jurisprudence and constitutional law to taxation and law and economics.

At the "Turn to Scholarship" conference, 12 doctoral candidates presented their recent legal research in four panels, encompassing the areas of International Law, Law and Economics, Law and Gender, and Law and Social Change. Each panel provided the opportunity for comments and critiques from Law School professors and professors from other graduate schools both at NYU and beyond.

"This has been a tremendous opportunity for J.S.D. candidates entering the academic market to make connections and present their research," said Christine Bateup, one of the conference organizers and a candidate in the J.S.D. program. Bateup said she hoped the conference would be an "important step toward the J.S.D. program playing a more integral role in the Law School."

Dean Richard Revesz echoed Bateup's hopes for the continued growth and vitality of the J.S.D. program. He also announced that students in the J.S.D. program would be taking over the old offices of the lawyering professors at 135 MacDougal Street. The dedicated office space, he said, was part of a commitment to the mission of the J.S.D. program.

"We're very proud of our J.S.D. program," the dean said. "Its focus is on producing good scholarship that will get people academic jobs as quickly as possible."

Professor of Law and Director of the J.S.D. Program Mattias Kumm highlighted three key components of the students' work: globalization of perspective and relevance, interdisciplinary research, and the intellectualization of legal work.

Among the papers related to international law was Roy Schöndorf's "A Theory of International Criminal Law as International Legislation." Schöndorf (J.S.D. '03) said there is a need for a "contextual application" of international criminal law that takes into account national criminal-law systems.

In her paper, "Authority, Legitimacy and Participation in International Legal Institutions: The Case of the Milosevic Trial," Maya Steinitz (J.S.D. '03) made the case that international law gains more authority through the "performance" of a trial that internationalizes the process of understanding and digesting a terrible event. In his comments on her paper, Benedict Kingsbury, Murry and Ida Becker Professor of Law and director of the Institute for International Law and Justice, noted the presence in the room of Professor Richard Goldstone, now a global

In Memoriam

On January 8, 2004, former New York University School of Law Professor Herbert Peterfreund died at the age of 90. He was a faculty member at the Law School between 1949 and 1978 as the Frederick I. and Grace A. Stokes Professor of Law, with emeritus status after 1978. He went on to become a distinguished professor of law at the University of California at San Diego.



Professor Norman Dorsen, the successor to the Stokes Chair and Peterfreund's colleague of 17 years, remembered his predecessor's "even temperament and practical approach to the law." Peterfreund was known as an expert in civil procedure and for his "lively and popular class" on New York Practice. His special contribution to academic life at the Law School earned him the 1968 "Great Teacher Award."

Many of those whom Peterfreund taught have gone on to high-powered careers. One successful former student is Herbert Wachtell ('54), a founding partner of Wachtell, Lipton, Rosen and Katz, one of New York's most respected firms. Wachtell remembered Peterfreund as "a consummate teacher—exciting, lucid and with a total command of the subject." Another former student, Eric Roth ('77), defined Peterfreund's style as "W.C. Fields using the Socratic Method."

Peterfreund was a World War II veteran and was extremely proud of his part in the European offensive. He left the Law School a bequest of \$150,000.

professor at the Law School and the former prosecutor at the International Criminal Tribunal of Yugoslavia.

Among the presenters studying law and economics was Michal Tsur (J.S.D. '03). In his paper, entitled "Anti-Takeover Defenses in Light of the Peacock's Tail (Evolutionary Insights into the Widespread Use of Anti-Takeover Defenses)," he argued that much like the peacock's tail that attracts the peahen but serves little other purpose, anti-takeover defenses prevalent in today's corporate culture have survived simply because of their ability to propagate, not because of their inherent efficiency.

A particular highlight of the conference was Harvard Law School Professor Janet Halley's presentation, "Split Decisions: Theories of Sex and Power in Legal Thought and Action." The keynote speaker drew a large crowd and provoked a lively debate regarding the contemporary position of feminist theory within the legal academy. ■

Six Inaugural Lectures Celebrate New Professorships, Javits Program

The **Jacob D. Fuchsberg Professorship of Law** was endowed by the Fuchsberg family to honor Judge Fuchsberg ('35), a preeminent trial lawyer, supporter of legal education, and protector of civil liberties on the New York Court of Appeals. The inaugural lecture, delivered by **Professor Barry Friedman**, the Jacob D. Fuchsberg Professor of Law, was entitled "The Importance of Being Positive: The Nature and Function of Judicial Review." Friedman argued that "judicial review serves primarily to foster a societal dialogue on the meaning of the Constitution and constitutional rights."

Dean Richard Revesz expressed his gratitude to the Fuchsberg family—four generations of which are Law School alumni, including Law School Trustee Alan Fuchsberg ('79)—for their generosity. "A chaired professorship is one of the most meaningful gifts that a donor can make," the dean said, noting that such professorships play an important role in building the NYU School of Law's extraordinary faculty.

Speakers at the inaugural lecture of the **Jacob K. Javits Distinguished Scholar In-Residence Program** paid tribute to the New York Senator's 24-year career as a champion of social security, civil rights, health-care reform, education, and the arts.

Javits's appeal was recalled by his wife, Marian, and his son Joshua, who help direct the Jacob K. Javits Foundation. They told the story of an encyclopedia salesman who never received a bachelor's degree but saved enough money to attend the NYU School of Law as a night student, graduating in 1926. While earning his two-year degree, Javits worked during the day collecting debts for businesses, attended classes in the evening, called his debtors again after class, and then finally began studying at 10 p.m. His son noted how much Javits valued his education at the Law School, where he learned the powerful skills of lucid explanation and structured thinking from his professors.

To honor the Javits legacy, **Professor Geoffrey Stone** chose to discuss the McCarthy era's threat to free speech and

its parallels to present-day concerns about civil liberties in a lecture titled "The End of Free Speech: A Cautionary Tale." Stone is visiting from the University of Chicago Law School, where he is the Harry Kalven Jr. Distinguished Service Professor of Law and a former dean and provost.

In his remarks to inaugurate the **George T. Lowy Professorship of Corporate Law**, Dean Revesz posited that the modern history of the Law School began with the class of 1955, of which Law School Trustee George Lowy was a member. "When a school's graduates do well, like the class of 1955 did, it makes people stop and take notice," the dean said.

The night's lecture, "Variety in Organizational Law," was given by **Professor Henry Hansmann**, a leader in the field of law and economics who has returned to Yale after a year at the NYU School of Law.

An eclectic crowd—lawyers, academics, doctors and a few well-behaved grandchildren—gathered in Greenberg Lounge in Vanderbilt Hall to celebrate the establishment of the **Norma Z. Paige Professorship of Law**.



Clockwise, from top left: The dean with Professor Barry Friedman; Professor Geoffrey Stone with Marian Javits and Dean Revesz; Professor Daniel Shaviro (left), and Wayne Perry (LL.M. '76); Professor Jennifer Arlen ('86); Michael Schill, now dean of UCLA's law school, who gave the Leonard Wilf talk.

“Not many professorships have been established by women,” Dean Revesz said. “And not many of those have had a woman as their first honoree. Tonight, we celebrate both, as we honor **Jennifer Arlen** (’86), our first Norma Z. Paige Professor of Law.” The chair is named for NYU School of Law alumna and Law School Trustee Paige (’46), who upon graduation established the law firm Paige & Paige in Manhattan with her husband, Samuel (LL.M. ’52). In 1958, she was elected president of the Women’s Bar Association of the State of New York. She then co-founded the Astronautics Corporation of America in Wisconsin, where she served as chairwoman for seventeen years and executive vice president and board member for forty-one years.

The inaugural lecture, “Beyond Vicarious Liability: Holding Managed Care Organizations Accountable for Physicians’ Negligence,” was given by Professor Arlen, who received her J.D. (’86) and a Ph.D. in Economics (’92) from NYU. After examining the liability of managed care organizations (MCOs) for physicians’ negligence, Arlen said corporations are held liable only for their employees, not for independent contractors. As a result, MCOs hire physicians as independent contractors to avoid liability for their negligence. This is true even as MCOs put pressure on doctors to reduce treatment cost and quality. Arlen said litigation that puts MCOs under the umbrella of liability forces them “to be responsible for their own actions. If they influence medical care, they should pay for the consequences.”

The inaugural lecture of the **Wayne Perry Professorship of Taxation** was given by Professor Daniel Shaviro, who focused on “The Use and Abuse of Fiscal Language” in the Bush administration. Professor Shaviro argued that the Bush tax cuts have not decreased the size and impact of the government, but have increased America’s fiscal gap. The Bush tax cuts, Shaviro believes, “shift the burden of taxation from the old to the young” because Congress will be forced to raise taxes later. He closed by noting the lack of commitment by Congress to deal realistically with the consequences of decreasing taxes and rising entitlement costs.

Perry, a Law School Trustee, whose son is a student at the Law School, received his LL.M. in taxation in 1976 and went on to become a major figure in the cellular telephone industry. He joined the fledgling McCaw Cellular as the primary legal officer in 1976 and rose to the position of Vice-Chairman by 1989, guiding McCaw through its merger with AT&T Wireless in 1994. Perry continues as a chief executive in the cellular industry, while pursuing outside activities such as leadership roles with the Seattle Mariners professional baseball team (managing general partner) and the Boy Scouts of America (President, Western Region).

Then-Professor **Michael Schill**, now the dean of the UCLA School of Law, inaugurated the **Leonard Wilf Professorship in Property Law**, giving a speech on “Housing, Markets and Law” in which he discussed the interplay of forces that are vital

to every community—developers, environmentalists, labor unions, municipalities and residents. Trustee Leonard Wilf (LL.M. ’77), is the president of Garden Homes Management Corp., one of the largest privately held companies in New Jersey. ■

Bush Policies Have Put Economy in Deep Peril

By Daniel N. Shaviro

President George W. Bush’s political fate in the 2004 elections will likely rise and fall with the state of the economy as voters go to the polls—but it shouldn’t.

Deciding whether to re-elect a president based on how the recovery is doing on Election Day is like picking your starting pitcher for Game 7 of the World Series by playing musical chairs in the bullpen. Just how things stand in the business cycle at the precise moment when the music stops and voters go to the polls is largely a matter of chance, over which presidents have little control.

It would make more sense for voters to ask how Bush’s policies will affect the economy over the long term. Here the news is likely to be devastating to his re-election prospects if it is properly understood. By enacting enormous tax cuts while also sharply increasing government spending, he has headed the national government’s finances and, over the long term, the U.S. economy, straight for a cliff.

The nation’s fiscal gap, a measure of the amount by which we currently fall short of being able to balance our books over the long run, was recently estimated at \$44 trillion. This is more than four times as large as our entire economy, and more than 10 times the government’s current debt from past borrowing. Anyone who thinks we could actually borrow this much (plus interest) in the world capital markets—as, if our policies do not change, we eventually will have to—is drunk or dreaming.

If we stay on the budgetary path on which Bush has placed us, at some point the people who buy our government’s bonds will start to get very nervous. They will realize that they are unlikely to be repaid unless taxes increase steeply and government spending is slashed—above all, on Social Security and Medicare, because their share of the budget is so huge.

Moreover, since this seems unlikely as outright default is so painful, prospective lenders will come to anticipate that our government, like countless improvident governments before it, will try to buy time by inflating the dollar.

In the short run, this would both devalue the debt that we had already issued by then and make it easier to disguise tax increases and spending cuts. Unfortunately, however, as countries such as Russia, Brazil and Argentina have learned before us, within a short time

this strategy causes inflation and interest rates to start racing each other like a puppy dog chasing its tail.

Other likely consequences of an approaching bond default include bank failures and rising unemployment, as businesses find it hard to invest in such an unstable economic environment. And this would not merely be the business cycle at work, like our successive “down” economy in 1992, boom economy in the late 1990s, and down economy again over the last three years. It would be a new economic situation that we would have to live with until we both had placed the federal budget on a stable and sustainable course, and persuaded worldwide capital markets that we really meant to be responsible from now on.

How can all this be staved off? Only by raising taxes and cutting spending so that we can meet our bills as a nation. Or rather, only by doing it sooner rather than later, since eventually it will be unavoidable.

Needless to say, none of the Democratic candidates for president is eager to promote this course, which would likely be a political cyanide pill. Indeed, while none of them bears President Bush’s personal responsibility for promoting the reckless fiscal policies of the last three years, it is not clear how much better, if at all, they would be than he over the next four.

A Democratic president might also be more likely to pursue certain types of spurious cures for our economic woes, such as blaming foreign trade or the flight of jobs abroad, in the face of the consensus by most economists that trade and global economic integration are good for our economy over the long haul.

Suppose the economy over the next 12 months performs reasonably well, as it certainly could since the fiscal dangers accentuated by Bush’s budgetary policies lie further in the future.

It would certainly be ironic if he won by taking bogus credit for the recovery, whereas his father in 1992 lost based on the motto “It’s the economy, stupid,” when in fact his father, not he, was the one whose stewardship of the U.S. economy was basically responsible and did not place us on a dangerous long-term path.

Originally printed in *Newsday*,
November 5, 2003

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Dean Richard Revesz with Professor Stephen Perry, the Fiorello La Guardia Professor of Law.

Captivating Conundrums

Law School Hosts the Prestigious Analytic Legal Philosophy Conference

What is the purpose of charters and bills of rights? Can there be democratic jurisprudence? Is there a unity of virtue as the Greeks espoused? These questions were at the center of the ninth annual Analytic Legal Philosophy Conference, hosted this year by the New York University School of Law. More than 50 scholars were invited to the two-day conference, which has rotated among such institutions as the Columbia University School of Law, Yale Law School, the University of Pennsylvania Law School, and Oxford University.

In introducing the conference, Dean Richard Revesz pointed out that many faculty members of the NYU School of Law, including Ronald Dworkin, the Frank Henry Sommer Professor of Law; Liam Murphy, Professor of Law and Philosophy; Thomas Nagel, University Professor; and Stephen Perry, the Fiorello LaGuardia Professor of Law, as well as the conference organizer, have made legal philosophy a core strength of the Law School. The probing insights and thoughtful critiques flowing during each conference segment exemplified how this distinguished group has contributed to the intellectual life of the Law School. "The conference provided a clear indication that analytical legal philosophy is a flourishing discipline," said Associate Professor of Law Mattias Kumm.

Presenters from abroad included Dr. Grant Lamond of Balliol College at Oxford Univer-

sity, who evaluated how precedent cases influence decision-making by courts, and Professor Wil Waluchow of Canada's McMaster University, who argued that charters (or bills) of rights should grow and change along with the times and circumstances.

American participants also tackled some tough topics. Professor Jeremy Waldron of Columbia delved into the "discomfort" between jurisprudence and democracy. Professor Michael Moore of the University of Illinois College of Law explored the nature of causal relationships, positing that they are events rather than facts, and that omissions, or failures to act, cannot be causes. Reaching back to ancient times, Professor Susan Wolf of the University of North Carolina tackled the Greek idea of the unity of virtue. Wolf argued that the meaning of "virtue as one," typically thought of as the idea that one cannot have a virtue without having all others, has been misunderstood. She proposed instead that virtue is unified based on knowledge. Possessing one virtue, Wolf said, requires the knowledge that is needed for possession of all the virtues, and in that way, the virtues are unified.

All in all it was a stimulating conference, with spirited exchanges between participants. Though each presentation may have generated more questions than it answered, the attendees left happy. After all, now they had even more to ponder. ■

The Saturday Profile

Weaving the Threads of Law, War and Shakespeare

BY MARLISE SIMONS

The New York Times
November 18, 2003

It seems fitting that on one side of Judge Theodor Meron's office walls there are books about Shakespeare and the medieval laws of war, and on the opposite side a set of outsize photographs of men trapped in a modern wartime concentration camp.

The books on Shakespeare Judge Meron wrote himself. The large black-and-white images, showing forbidding fences and hollow-eyed prisoners, are of Manjaca, a Serbian-run camp of the early 1990's when war raged in Bosnia.

Drama, barbarity and accountability are very much the threads that have run through Judge Meron's life, from the time he was a teenage prisoner in a Nazi camp, to when he became a scholar of international law in New York, and now, as the president of the United Nations war crimes tribunal that deals with the atrocities of the former Yugoslavia.

In conversation, he does not like to dwell on his troubled Jewish youth in his native Poland or on the four harsh years he spent in Czestochowa, at a Nazi labor camp. He waved away the subject each time he was asked, as if anxious to avoid any suggestion that his past would somehow affect his tasks as chief judge.

But yes, he conceded, those years in the Nazi camp had unquestionably propelled him to study law in order to "explore the means to avoid mistreatment, to focus on ways to protect human dignity."

Less hesitant now, he continued: "From age 9 to 15, I did not go to school at all. There were tremendous gaps in my education. It gave me a great hunger for learning, and I dreamed that one day I could go to school.

"It is of course even more poignant that someone with my background can become a judge here, and even the president of this body," he said. "I find it daunting."

At the tribunal, with its sober headquarters near the wooded outskirts of The Hague, all the 16 permanent judges come from different corners of the world and widely varied backgrounds. But none have made quite the zigzagging route from a labor camp in Poland to Israel, then to the United States. Some of his colleagues here have had to cope with political pressures at

home, but probably few have directly experienced the kind of persecution that they hear about at the tribunal.

Judge Meron, now an American citizen and a professor of international law at New York University School of Law, currently on extended leave, has just been re-elected to a new term as the tribunal president, a post that requires him to serve as an appeals judge, steer the chambers, schedule cases and act as a diplomat. Inevitably, crimes

provided lame pretexts so as not to incriminate themselves; there are the nobles or military commanders concocting alibis; there are the enemy combatants, then and now, who are abused as they are held captive; prisoners and civilians are raped and killed, disregarding centuries-old codes of doing battle.

Those codes fascinated him as a scholar of international law and became the subjects of two books of which he is evidently proud: "Henry's Wars and Shakespeare's Laws"

(Oxford University Press, 1993) and "Bloody Constraint: War and Chivalry in Shakespeare" (Oxford University Press, 1998).

Judge Meron's eyes light up as he turns to what is clearly his passion: the principles of humanitarian law—the quest to avoid the worst excesses of war—which appeared in early texts and became part of the modern Geneva Conventions, other international protocols and even the statutes of the tribunal itself.

He declines to discuss the current trial of the court's most famous defendant, Slobodan Milosevic, the former Yugoslav president, or cases against others here charged with massacres or widespread abuse, or both. He would also not comment on the

fate of other prisoners of more recent wars.

"As a judge, it would not be appropriate for me to refer to any current case," he said. "But the fact is that before this tribunal we see the same type of age-old human tendency, of leaders and commanders washing their hands. It was already of great concern in Shakespeare's time, and it remains at the very center of war crimes today.

"Shakespeare's dialogues that touch on the moral and legal duties of leaders, their accountability, their attempt to evade blame, will resonate in the ears of anyone who listens to the major trials going on here."

Certainly, it is hard not to think of the trials at the tribunal that deal with the 1995 massacre of more than 7,500 people, almost all Muslim men and boys, around Srebrenica



Judge Theodor Meron standing before stark images of a Serbian war camp.

against humanity, like those he witnessed as a young man, appear in his own and in the tribunal's daily workload.

But there are other unexpected ways in which now, at age 73, he sees parts of his life coming together.

Judge Meron also brought to the court the uncommon perspective of having studied the evolution of the laws of war, above all by using medieval chronicles and the plays of Shakespeare. It is here at the tribunal, as he watches its trials unfold, that he finds remarkable parallels, the dilemmas and moral doubts that are as much a part of long-ago conflicts as the recent civil wars that tore up Yugoslavia.

Similarities are manyfold, he says: there are the ancient kings and the modern political leaders who avoided signed orders or

in Bosnia when Judge Meron invokes a passage from “Henry V” the scene at Agincourt, France, in 1415. In the scene, the invading English troops have won the battle and are holding uncounted French soldiers as prisoners. Then, to the consternation of some of his officers, Henry orders all the French prisoners of war to be killed.

“Tis expressly against the law of arms,” says one of Henry’s captains. The king even summons yeomen not bound by chivalric codes to join the slaughter. Such a call has an echo here at the tribunal. Some trials deal with the actions of particularly violent paramilitary gangs, employed to hound and kill non-Serbian civilians in Bosnia.

In another part of “Henry V,” Judge Meron points to a revealing scene outside the French town of Harfleur, long under siege by English troops. Before the town walls, Henry warns the town elders to surrender because he may not be able to stop his troops from committing murder, robbery and rape. The judge turned to the passage:

*What is't to me, when you yourselves are cause
If your pure maidens fall into the hand
Of hot and forcing violation?*

Henry goes on to issue a warning:

Your fathers taken by the silver beards

*And their most reverend heads dash'd to the wall;
Your naked infants spitted upon pikes.*

“This is blackmail, of course,” said Judge Meron, “because it did not happen, but it also reads like a list of war crimes of the kind we are dealing with.” The haunting part, he said, is less that such horrors occurred centuries ago, but that they persist on such a scale today.

Judge Meron, however, sees a shift, not in the facts of violence but in the international perception that the world must deal with war crimes and other large-scale abuse. Even in the former Yugoslavia, which has long been biased against the tribunal, he sees a change of mood, a recognition that a reckoning is needed.

As the tribunal will wind down its work in the coming years—it intends to end investigations this year and its trials in 2008—Judge Meron sees a future in which remaining cases of war crimes and grave abuses will be tried in various parts of the former Yugoslavia. He speaks of special tribunals that will be formed in Sarajevo, Zagreb and Belgrade. Until now, he said, there has been no choice but to hold the trials here in The Hague.

“We must remember,” he said, “without this tribunal, what would have followed is impunity.”

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Study Disputes View of Costly Surge in Class-Action Suits

BY JONATHAN D. GLATER

The New York Times

January 14, 2004

A new study has concluded that both the average price of settling class-action lawsuits and the average fee paid to lawyers who bring them have held steady for a decade, even though companies have said the suits are driving up the cost of doing business, hurting the economy and lining lawyers’ pockets.

panies spend millions of dollars each year to defend against class-action lawsuits—money that should be used to expand, develop new products and create jobs.”

But the new study undermines some of those criticisms. It covers the biggest sample to date of class-action cases, ranging from civil rights violations to securities fraud. Its results, published in a new law publication, the *Journal of Empirical Legal Studies*, and already circulating, will certainly be used by lawyers trying to head off such legislation.

“This empirical study comes out and says the system is working correctly,” said David



Professor Geoffrey Miller was surprised by the results of a class-action lawsuit study he co-authored.

The issue is a fiercely divisive one that has fueled a heated debate over whether to place limits on class-action lawsuits. Legislation to curb class actions is a priority of President Bush and many Republicans in Congress.

The two law school professors who conducted the study, which was not financed by corporations or by trial lawyers, expressed surprise themselves over the results. “We started out writing an article about fees,” said Theodore Eisenberg, a law professor at Cornell and one author of the study, “but the shocking thing was that recoveries weren’t up.”

Senator Orrin G. Hatch, a Utah Republican and the chief sponsor of a bill that died in October in the Senate, has attacked the current system of class-action litigation as “jackpot justice, with attorneys collecting the windfall.” Thomas J. Donohue, president and chief executive of the United States Chamber of Commerce, has complained that “compa-

S. Casey Jr., president of the Association of Trial Lawyers of America, who was in Washington last week meeting with officials planning the body’s legislative strategy for 2004. “I’m glad there are empirical studies being done,” Mr. Casey said. “The whole effort by what I call the tort reform industry is based on myth and fabrication.”

Those who advocate limiting class-action filings—and changing the nation’s tort laws more generally—are dismissing the study’s results. “I’m not sure that these findings end up meaning a lot,” said Stan Anderson, executive vice president and chief legal officer of the United States Chamber of Commerce and chairman of the Class Action Coalition, a group of 100 companies supporting legislation to change rules governing class-action lawsuits. “You can’t argue against class actions per se or its efficacy. What we argue is very simple, that there are problem jurisdictions around the country.”

Reliable data on the total number of class-action lawsuits filed or settled in a given year do not exist. Such data could bolster corporate defendants' arguments that even if the size of settlements is not increasing, the number of cases is rising. The number of suits filed in federal court has risen steadily, roughly doubling from 1997 to 2002, according to the Administrative Office of United States Courts. But state courts probably oversee the most class-action suits, and they produce the least data, said Nicholas M. Pace, a researcher at the Rand Institute for Civil Justice, which studies legal issues for the RAND Corporation.

"People will continue to research this thing for years—and fight about it," Mr. Pace said.

In their article, Mr. Eisenberg and his co-author, Geoffrey P. Miller, a New York University law professor, write that if the effects of inflation are taken into account, then from 1993 through 2002, "contrary to popular belief, we find no robust evidence that either recoveries for plaintiffs or fees for their attorneys as a percentage of the class recovery increased."

According to the study, the average settlement over the 10-year period was \$100 million in inflation-adjusted 2002 dollars. It rose as high as \$274 million in 2000—a result of four settlements that year for more than \$1 billion each—and fell as low as \$25 million in 1996. "The mean client recovery has not noticeably increased over the last decade," the professors wrote.

The study also found that "neither the mean nor the median level of fee awards has increased over time." The average fee rose as high as \$31 million in 2000, but exceeded \$10 million in only two other years. The professors also report that as one might expect, the larger a settlement, the smaller the percentage allocated to legal fees. For the largest 10 percent of settlements, which averaged \$929 million, lawyers received an average of 12 percent. For the smallest 10 percent, which averaged \$800,000, lawyers received nearly 30 percent. Fees were higher in cases that were more risky and were higher in federal court cases than in state courts.

"No real-dollar increase in the level of fee awards in major cases over the course of a decade is not the sort of fact we are accustomed to hearing," the professors wrote in the report.

Mr. Eisenberg and Mr. Miller spent several months reading about 400 state and federal court opinions describing class-action lawsuits. Mr. Eisenberg has used statistical analysis to examine where companies choose to file for bankruptcy protection and on trends in punitive damage awards; Mr. Miller has studied class-action litigation and legal fees. Each has served as a consultant to defense and plaintiffs' lawyers.

Their initial goal, both men said, was to find out how courts historically apportioned fees to help guide judges. The study is the most comprehensive to date and draws on original research that others have not attempted, according to people who have studied class-action litigation.

"The Eisenberg and Miller study is in many senses a real advance" because its authors read actual court cases to learn the provisions in settlement agreements, said Deborah R. Hensler, a law professor at Stanford who has also studied class actions.

"I'm not surprised by the findings in the Eisenberg and Miller study in most regards because they seem quite consistent with many of the patterns we found in our much smaller pattern of case studies," Ms. Hensler said.

Todd Foster, a senior consultant at NERA Economic Consulting, said that his firm also had not found an upward trend in settlement amounts.

There can be no doubt that some lawsuits are frivolous and that they do impose substantial costs on businesses, as other studies have found. A report released a few weeks ago by Tillinghast-Towers Perrin, a consulting firm that primarily serves insurance companies, concluded that tort litigation costs rose 13.3 percent in 2002, to \$233 billion, "which translates to \$809 per person."

Those results, which draw on data supplied by the insurance industry, proprietary data on medical malpractice claims and estimates of costs borne by self-insured companies, did not measure the same thing as the two law professors' study. The Tillinghast study covered all payments made or expected to be made, whether as a result of a jury verdict or a settlement, in a class action or individual lawsuit, said Russ Sutter, a principal at Tillinghast and the primary author. He added that the study did not have a political agenda. "It's our job just to keep score," he said.

A Bloomberg News study last week found that jury verdicts in the United States (as opposed to settlements) last year resulted in damage awards of \$13.8 billion against companies in just a subset of cases—those involving suspected fraud—up from less than \$1.5 billion in 2002.

Supporters of changes to the nation's tort laws, which govern civil litigation in personal injury cases, have numerous criticisms of the Eisenberg-Miller study.

Some jurisdictions are known for presiding over excessive settlements and jury verdicts, said Mr. Anderson of the Chamber of Commerce.

"Many states, we don't have problems with what happens," he said. Averaging outcomes in states where lawsuits result in large settlements with those in other states, he continued, may not show anything.

The article also relied on court opinions describing settlements, Mr. Anderson said, and those tend to be federal cases.

State court cases may be a major source of outside settlements, he said. "It's a critical piece of information that wasn't there," he added.

Mr. Eisenberg responded that in the absence of published court opinions it is very difficult to learn about state court settlements.

Ms. Hensler, the Stanford law professor, said that one flaw in the study was that the amount of the settlement could be less than the amount actually received by plaintiffs, driving up the percentage paid to lawyers. The types of cases may also have changed over the last decade, she said. For example, smaller settlements might be reported more or less often. Mr. Eisenberg said that a larger study would be helpful, along with access to more detailed information on settlements. But critical facts are often sealed by the courts, he said. For now, he added, "there's no better data."

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Lawyer With an Attitude

BY KATHERINE S. MANGAN

The Chronicle of Higher Education
February 13, 2004

Several hours into a late-evening strategy session with seven of his New York University students, Gerald P. Lopez suddenly morphs from calm, Harvard-educated law professor into angry ex-convict.

The students, who are enrolled in his Community Economic Development Clinic, have just described the red tape that the make-believe ex-con will have to go through to exchange his prison mug shot for an ordinary identity card.

“What the hell do you mean—that I need an identity card to get an identity card?” he explodes. “That’s bullshit!”

Mr. Lopez’s outburst injects a dose of reality into a discussion of the problems that newly released drug dealers, robbers, and rapists face when they try to move back into their East Harlem neighborhoods.

To the professor, whose clinic is one of 21 at NYU’s law school, this is more than an academic exercise. The son of Mexican immigrants, he grew up in a gang-ridden section of East Los Angeles and watched his older brother cycle in and out of prisons. “As a kid, my life was dominated by the people he hung with,” Mr. Lopez says. “If you think they’re bad going in, you have no idea what they’ll be like coming out.”

He watched his brother, a gang member and heroin addict, struggle to pick up the pieces of his life each time he was released. “There’s very little out here for them,” Mr. Lopez says. “They may not know how to access drug and alcohol programs, and some of them may have AIDS. They may find themselves stranded with little education, no jobs, and families in disrepair.”

That’s where his students come in. These budding public-interest lawyers are taking to the streets, knocking on doors, and gather-

ing information with the goal of solving problems, not just filing lawsuits.

Mr. Lopez calls it “rebellious lawyering,” from his 1992 book of the same title. The approach has had a profound impact on the teaching and practice of public-interest law across the country. Instead of casting the lawyer as the sage and hero who comes in to rescue people from their troubles, he believes that lawyers should work alongside people without many resources to fall back on, to help them identify and solve their problems.

For instance, students in his clinic are meeting with day laborers to discuss their options when employers stiff them and, if they complain, threaten to turn them in to immigration officials. And, working with



Public-interest law professor Gerald Lopez, who teaches the Community Economic Development Clinic.

rehabilitation counselors and social workers, the students are developing guides and public-awareness campaigns to help former prisoners readjust to life outside bars.

In his work and his writing, Mr. Lopez has inspired other law-clinic professors to adopt the problem-solving approach that views lawyers and their clients as part of a larger community network. He has also inspired countless students to stick with their dream of public-interest law—even when the odds seemed stacked against them. Along the way, he has helped law schools seeking to find a balance between producing corporate counsel and lawyers who are interested in practicing the sort of law that helps America’s underdogs.

Hard Times

Public-interest law is a tough sell at a time when law students’ debts are rising and public-interest salaries are shrinking.

The American Bar Association reported last year that law students are finding it harder than ever to afford to take jobs in public-interest law, where starting salaries average \$36,000, compared with \$90,000 in private law firms. The typical law-school graduate owes more than \$80,000 in student loans, the report noted (*The Chronicle*, September 5). Those who do choose public-interest jobs often give them up after a few years.

Even if they are willing to work for less, law-school graduates often find that com-

petition for public-interest-law jobs is intense simply because there are relatively few openings. “Almost all of our graduates can get jobs paying \$125,000 a year, but if they want to get a public-interest job that pays \$40,000, it’s difficult,” says Richard L. Revesz, NYU’s law-school dean.

Many community and federal agencies, facing tough times, can’t afford to hire as many lawyers as they need. Even when they can, the offers often go out late in the spring, months after private law firms have begun locking in their hires. So while third-year students are

snatching up lucrative job offers in December or January, those holding out for public-interest jobs might not get them until late spring, if at all.

The proportion of law-school graduates going directly into public-interest jobs (excluding government positions) was only 2.9 percent in 2002, the last year for which figures are available. That’s down from a high of 5.8 percent in 1978, according to the National Association for Law Placement.

NYU, which has one of the most extensive public-interest-law programs in the country, helps students who pursue careers in the field repay their loans. And it is trying a variety of approaches to keep students committed.

Its first-year Lawyering Program requires students to work through real-life legal cases, doing mock interviews with other students acting as clients, drafting memos, arguing motions, and attempting mediation. Second-year students get more in-depth experience in courses that involve courtroom simulations. By the third year, they can represent real clients, under the supervision of a lawyer or law professor. Some represent death-row prisoners in New York and Alabama; others work with immigrants threatened with deportation or parents accused of neglecting their children.

In June, NYU went a step further, hiring Deborah A. Ellis as assistant dean for public-interest law to advise students and help them find jobs.

“Law schools have a responsibility to help students with this career direction, which is very difficult,” says Ms. Ellis, an NYU law alumna who has worked for the Southern Poverty Law Center, the National Organization for Women, and the American Civil Liberties Union. “If you take a hands-off approach, the path of least resistance is to go to the higher-paying jobs.”

Clinical professors like Mr. Lopez try to expose students to the real-life challenges and rewards of public-service work. After cofounding public-interest-law programs at Stanford University and the University of California at Los Angeles, Mr. Lopez was recruited to bring his brand of rebellious lawyering to NYU in 1999. Last year he set up NYU’s Center for the Practice and Study of Community Problem Solving, which works with low-income, minority, and immigrant residents.

The center’s first undertaking was a telephone survey of 2,000 residents of Harlem and other low-income neighborhoods of New York City and in-person interviews with 1,000 social workers, drug counselors, government officials, and church leaders, conducted by students and other volunteers. The goal was to determine what the residents’ biggest needs were—whether law-related or not—and what resources were available to them.

Mr. Lopez himself spent much of his first year at NYU walking the streets of the city’s low-income and immigrant neighborhoods. “I love roaming in neighborhoods and talking to people,” he says. “I end up taking on issues that people don’t want to tackle or looking for problems that sit at the bottom of the barrel.”

Tall, with an athletic build and fashionably shaved head, the 55-year-old law professor can be both inspiring and irreverent in the classroom. Very much the Ivy League lawyer one minute, he lapses naturally into street jargon the next to bring home a point or act out the role of a client whom his students are likely to face.

One of Mr. Lopez’s former students, Steven J. Gunn, was so inspired by his professor’s book—*Rebellious Lawyering: One*

Chicano’s Vision of Progressive Law Practice (Westview Press)—that he began a national “rebellious lawyering” student conference. Now in its 10th year at Yale Law School, the conference was expected to attract hundreds of students, lawyers, and community activists last week.

Mr. Gunn, now an associate professor of law at Washington University in St. Louis, says he was attracted by the notions “that a lawyer doesn’t have all of the answers, and that the client is central. ... A lawyer should know when to take a back seat.”

David Stern, executive director of Equal Justice Works, a national group that promotes public-interest service among law students, calls Mr. Lopez’s work “absolutely seminal” in the development of progressive public-interest law. While he strongly supports the professor’s approach, he acknowledges that some traditionally educated lawyers argue that the students are spending too much time being community activists and not enough time solving legal problems.

“Most litigators don’t like this approach,” says Mr. Stern. “They say, ‘Lawyers are specially trained to sue. That’s the tool of our trade. Why are these folks learning social work?’”

Mr. Lopez smiles when asked whether he has heard criticism of his holistic approach. “Sure,” he says. “The common refrain is, ‘Where’s the law?’ or ‘We’re already working hard enough. Why are you laying all of this extra shit on us?’”

In fact, if more people embraced Mr. Lopez’s vision of lawyers as problem solvers, Mr. Stern argues, then more philanthropies would be willing to help pay for their services to tackle a variety of problems. And that, he says, could expand the range of public-interest jobs available. For instance, a foundation dedicated to improving health care might agree to support the salary of someone who helped low-income people who were denied access to care.

“If a lawyer doesn’t come in saying, ‘I’ll sue that damn hospital,’ but instead looks at ways to get at the root causes of the problem, that could be very appealing,” says Mr. Stern.

Skiping Class

For a law professor, Mr. Lopez comes from a background as untraditional as his approach to the practice of law. His older brother’s escalating drug problems and stints in prison made him, ironically, a positive influence. “He always said he’d kick my ass if I followed in his path, and he did that, literally, when he found me out on the street smoking when I was 5 or 6,” Mr. Lopez recalls. His brother eventually passed a high-school-equivalency exam and worked on and off as a drug counselor and horse groomer. Most recently, he spent

more than a decade living with, and caring for, their ailing mother.

Mr. Lopez generally stayed out of trouble and poured his energies into sports instead. Neither of his parents had gone to college, but both assumed that he would go not only to college, but to graduate school as well. His father died before he could see Mr. Lopez enter the University of Southern California, where he earned a degree in economics.

After getting into “four fancy law schools” that he thought his father would have approved of, he chose Harvard University, where he was one of only a handful of Latino students in 1970. “Culturally, it was very alienating,” he says. A facile test taker who had coasted through school with little motivation or discipline, he was also turned off by a curriculum that, at the time, seemed largely theoretical and divorced from the real-life issues he cared about.

But while he was skipping out on his law classes, he was coming upon a world of books in Cambridge. For the first time in his life, haunting bookstores and libraries, he became an avid reader. After dropping out of law school for a semester to travel, he returned and graduated.

Mr. Lopez spent the next five months caring for children, cleaning, and doing odd jobs at an orphanage near Mexico City. He moved to San Diego, where he clerked for a federal judge who let him explore the courthouse, sitting in on all kinds of trials. “By then,” he says, “I had become the complete sponge, watching trials and reading voraciously.”

That led to his decision to join with three partners in a storefront law office in San Diego, where they worked as criminal defense lawyers who were also active in community advocacy. Next came teaching at the California Western School of Law, and at UCLA and Stanford.

James Perez, a second-year law student at NYU who grew up in a poor neighborhood in Los Angeles, signed up for Mr. Lopez’s economic-development clinic after hearing him speak about his own, similar background. In the clinic, Mr. Perez works with people who can’t afford to open checking accounts and so are vulnerable to check-cashing rip-offs.

“When I first came to law school I felt out of place, but Jerry gave me hope that it’s possible for someone like me to succeed at an elite law school and to return to my community to make it better,” says Mr. Perez. “A lot of people sympathize with low-income people who don’t know their rights from a hole in the wall, but he empathizes with them because he’s been there. He hasn’t forgotten where he came from.”

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Student Spotlight



From Scholarly Papers to Law Revue, the Highs and Lows of Student Life

Unquestionably, at the core of student life is academic scholarship, exemplified here by the excerpts of three award-winning papers published by members of the Class of 2004—Kristine Hutchinson, Josh Kagan, and David Lehn.

The swirl of activity at the NYU School of Law is set by the students, as their varied interests, intellectual curiosity, and virtually endless energy form an engaging and sustaining tempo.

The Student News section describes achievements, awards, receptions and other happenings on campus including the annual Marden Moot Court competition, and the induction of new members to the Order of the Coif.

Student organizations also hosted a wide variety of compelling colloquia, symposia, and conferences, such as the *Environmental Law Journal's* session about water allocation, and the *Journal of International Law and Politics'* Herbert Rubin ('42) and Judge Rose Luttan

Rubin ('42) International Law Symposium focusing on the repercussions of the use of force in Kosovo and Iraq, or the Conference on International Law and the Middle East Conflict, which explored human rights in the context of the controversial Israeli security barrier.

Of course, no academic year is complete without the annual show, where student-actors get the chance to poke fun at Dean Richard Revesz and other faculty members, or the Fall Ball and Spring Fling, where colorful pictures are taken and memories are made. ■

Online education and copyrights. Legal standards for children's education. The judicial system and our evolving interpretation of the law. These topics captured the imagination of three members of the Law School Class of 2004, leading them to a level of scholarship and insight that resulted in the following award-winning notes.

The TEACH Act: Copyright Law and Online Education

BY KRISTINE HUTCHINSON ('04)

The note excerpted below was published in the NYU Law Review (December, 2003) and won Kristine Hutchinson the Judge Rose L. and Herbert Rubin Law Review Prize for "the most outstanding note for the Law Review in international, commercial, or public law." Hutchinson wrote under the supervision of Professor Rebecca Tushnet, and was inspired by her interest and belief in the value of online education, which stems from her undergraduate research on the subject at Brown University. She was the senior notes editor of the NYU Law Review. This fall, she becomes an associate at Debevoise & Plimpton in New York City.

In 1996, an accredited nonprofit university began offering an online course entitled "History of Jazz: New Orleans." Students enrolled in the course must purchase a print textbook and its accompanying compact disc (CD), but the university makes all other course materials available through the Internet. Students "attend" class by sitting in front of their computers—at home, at their offices, or wherever they have an Internet connection—and reading and interacting with the course website.

One of the goals of the course is to enable students to "identify African American musical elements that distinguish jazz from other musical styles." To this end, the text of the course describes beats, melodies, and lyrics, and then asks students to play various tracks from the CDs that they purchased to demonstrate each example. In a comparable on-campus course, the professor would likely play each song, or portions of it, for the class to illustrate each example she described during her lecture, stopping to point out specific features to which she wanted students to pay particular attention.



Kristine Hutchinson ('04)

Although a commercial entity, such as a stadium playing a song during a basketball game, would have to get a license from the copyright owners in the musical composition to play a track from a CD to its audience without

being liable for copyright infringement, a teacher in the course of face-to-face teaching activities needs no such license. Section 110(1) of the Copyright Act of 1976 expressly exempts teachers at nonprofit educational institutions from liability for copyright infringement when they perform or display copyrighted works in their classrooms in the context of face-to-face teaching. Until November of 2002, however, there was no specific statutory exemption for teachers of online courses. Instead, online educators had to get licenses from copyright owners for their uses of copyrighted works in online courses or rely on the general statutory exception known as fair use. Because the online performance of the exemplary tracks from the CD in the History of Jazz course would substitute for students' purchase of that CD, a court might have difficulty finding that the fair use exception applies in this context. As a result, the online educator would be forced to secure a license from the copyright owner to integrate the audio clips into her course rather than asking students to purchase and play specific tracks from the CD independently. Licenses for online uses, however, particularly for popular media such as music and movies, can be prohibitively expensive.

In an attempt to remedy the disparity between the legal uses of copyrighted works in face-to-face teaching and the legal uses in online education, Congress passed the Technology, Education, and Copyright Harmonization Act (TEACH Act) in November, 2002. The TEACH Act allows online educators to display all types of copyrighted works and to perform entire nondramatic literary and musical works and reasonable and limited portions of all other types of works. As a compromise to gain these rights, online educators must provide protection against potential abuses of the copyrighted material. Thus, in order to secure the right to use greater types of copyrighted works in the course of online education, educators must have copyright policies in place to promote compliance with copyright law and must use technological protection measures to reasonably prevent unauthorized retention and dissemination of those copyrighted works.

Many of the compromises made during the legislative process have limited the effect of the legislation. In some cases, the negotiating parties incorporated such limits into the Act itself—restricting the performances and displays of works that are not nondramatic literary or musical works to reasonable and limited portions of those works. However, in many cases the limiting effects of the TEACH Act arguably were unintended. For example, because the TEACH Act requires institutions to "reasonably prevent" unauthorized retention and dissemination of the copyrighted works that they use for online education, some institutions, which either do not know what they must do to meet this requirement or cannot afford to meet it, will choose not to rely on the legislation. Still other limitations are the result of societal or market forces. These limiting factors include many educators' lack of interest in using the expanded types of copyrighted works that the TEACH Act authorizes and the fact that many providers of online education do not qualify as accredited nonprofit educational institutions and are therefore ineligible to take advantage of the TEACH Act.

Because congressional legislation must balance the competing interests of copyright owners and educators and because the educational community itself agreed to the compromises, the TEACH Act is likely the most educator-friendly legislation that Congress will produce in the near future. Thus, while there are clear limitations to the application of the TEACH Act, educators should work within the frameworks of the TEACH Act and the general statutory exception of fair use to continue to develop creative and effective teaching and learning experiences for students in online courses.

To make the TEACH Act more effective, educational institutions need to establish a dialogue about copyright policies between the administration and faculty members. Ken Salomon, who lobbied on behalf of educators for the TEACH Act, reports that national interest groups have sent summaries of the legislation to the attorneys for colleges and universities and are working on a summary of the level of technological protection that an institution must have in place to comply with the requirements of the TEACH Act. While distributing such summaries to educational institutions' administrations might achieve the goal of making institutions aware of updates to copyright law, some commentators have expressed skepticism that a national conversation about the issue will have an impact on individual educators. If academic associations and similar interest groups, who have knowledge of and interest in copyright legislation, cannot be the messengers because of their lack of access to individual educators, that task is necessarily left to educational institutions.

An educational institution should inform its faculty members of at least two pieces of information: (1) a definition of terms, and (2) the extent of the technological protections necessary to preclude liability for copyright infringement. Definition is particularly important for terms that the drafters intentionally left vague in the legislation, such as "reasonable and limited portions." The Copyright Office report offers some guidance for institutions when defining these terms, but even the Copyright Office's definitions are vague. The administration should provide guidelines for educators for what it considers to be "reasonable and limited" for each type of copyrighted work, such as page limits for journal articles or book chapters or time limits for audio and video clips. These guidelines will be based on a number of factors, including the total length of the copyrighted work from which the excerpt is drawn, the number of copyrighted works used in a course, and the number of copyrighted works by a particular author used in the course. For example, for the History of Jazz course, the institution's guidelines could specify that the professor may use 20-second clips (approximately 10 percent) of each copyrighted song, provided that the song is at least three-and-a-half minutes long and that the professor does not use more than two songs from any particular artist. If the professor is using a large number of audio clips, however, the institution may prefer to minimize its risk by requiring that the individual clips be shorter in length or by limiting the total number of audio clips the professor can use. The length of audio clips the university permits may also be based on the total number of audio clips the institution is using school-wide. If the institution is

using audio clips in nearly all of its online classes and has many such classes, it may choose to employ more conservative definitions for "reasonable and limited portions" so as to minimize the institution's exposure to risk across the board.

The factors that an educational institution must consider when developing definitions for what constitutes "reasonable and limited portions" are significant, and how the institution chooses to define those terms will depend in part on how risk averse the university is. By providing general guidelines rather than dictating exactly what content educators can put in their course websites, the administration avoids interfering with educators' academic freedom while preventing liability for copyright infringement.

Beyond defining the terms contained in the legislation, an administration should clarify what it considers to be adequate technological protection measures. While precise standards defining what qualifies as adequate protection are still in the process of development, because the TEACH Act creates an affirmative duty on the part of an institution to ensure that copyrighted works are adequately protected against unauthorized retention and dissemination, clarification of standards in this area is particularly important. In developing its standards, the administration should consider the nature of available technologies and which technologies map onto its concept of protection against retention and dissemination. Then, rather than outlining to educators its specific conception of what constitutes adequate protections, the administration can make approved technologies available through its Information and Technology Department and require educators to use only those approved technologies. If an educational institution distributes information about the TEACH Act to faculty members and includes these components in its message, it has the potential of increasing the effect of the TEACH Act by alleviating some of the barriers to its implementation.

Full implementation of the TEACH Act requires significant effort on the part of administrations, but also offers the potential for significant returns. By granting educators greater rights to use copyrighted works in online education, the TEACH Act enables educators to remove barriers to access to high quality educational experiences. Opening the path for discussion of copyright issues in online education allows an educational institution concomitantly to open avenues for discussion of ways to integrate the use of technology into traditional classroom-based courses and how to make the use of technology and copyrighted materials more effective in all areas of education—classroom-based and online. ■

A Civics Action

Interpreting "adequacy" in state constitutions' education articles

BY JOSH KAGAN ('04)



Josh Kagan ('04)

Five years working with Jumpstart, an AmeriCorps program that mentors children in Head Start classes, as well as internships with the NAACP Legal Defense Fund, Advocates for Children, and the Legal Aid Society's Juvenile

Rights Division fanned an interest in children's rights that inspired the note excerpted below. It appeared in the NYU Law Review (December 2003), where Josh Kagan was senior articles editor, and won the Paul D. Kaufman Memorial Award for the most outstanding note published in the review. Kagan was advised by Professor of Clinical Law Randy Hertz. He is currently a law clerk for the Hon. Marsha S. Berzon at the U.S. Court of Appeals for the Ninth Circuit, in San Francisco.

Nearly every state constitution requires the state to provide its children with an adequate education. Litigation based on these nineteenth-century clauses now dominates the current wave of school reform cases. The U.S. Constitution contains no clause directly addressing education; thus the education clauses in state constitutions provide plaintiffs with claims that could avoid a federal bench unwilling to hear right to education cases.

Plaintiffs have achieved victories in several states, but they have done so under inconsistent and often flawed theories. As a result, initial courtroom victories have become empty in the face of weak remedies, legislative inaction, and legal backtracking in later cases.

This note presents a theoretical approach to defining and measuring adequacy: Courts should take a broad view of history and national education practice to inform state constitutional interpretation. This view leads to defining adequacy based on the goal of developing children into productive citizens, and measuring of adequacy based on educational inputs—in terms of dollars, personnel, curriculum, buildings, supplies, and similar factors—required to reach that goal, rather than outputs such as standardized test scores.

Interpretive Choices in Education Adequacy Cases

In education adequacy cases, state courts must define a constitutionally adequate education, determine how to objectively measure adequacy, and decide upon a remedy. Judges and commentators have presented four options for how to define and measure adequacy.

First, a court could use existing legislative or executive standards to define and measure adequacy. This approach postulates that existing legislative or executive standards—such as standardized tests—define a constitutionally adequate education and uses those tests to measure a school's quality. However, this finds no support in state education clauses. Instead, this approach suggests an easy way to measure adequacy without truly defining it or identifying appropriate remedies.

Second, a court could order the legislature or executive branch to decide upon a definition and measurement. This approach fails for the same reason as the existing standards approach—it delegates judicial authority to the legislature without constitutional basis. Both approaches also lack a link between their definition of adequacy and remedy for inadequacy. Accepting legislative enactments as the definition of adequacy presumes that the legislature has the power to alter that definition in a manner contrary to the fundamental purposes of the education article.

Third, a court could come up with its own list of required outputs. Where courts have followed this approach, their rulings have sometimes strayed from the history and purpose of state educational clauses. Additionally, any focus on educational outputs raises remedial problems. Faced with chronic inadequacy in particular schools, a court could order the state to increase test scores, but would have no basis for ordering any particular steps to reach that goal.

Fourth, a court could come up with its own list of inputs. So long as this list shares a nexus with education clauses, as discussed below, this is the preferred approach.

The Historical and Theoretical Roots of State Education Clause Interpretation

State court aggressiveness in enforcing education articles is warranted by the unique nature of state constitutions and state governments.

Nearly every state constitution includes what Professor Helen Hershkoff calls “due process of lawmaking” requirements, which display a relative lack of faith in the legislative branch. State governments require aggressive judicial checks because—due to

their smaller size and less media attention—they are more vulnerable to factions twisting the results of a democratic process. Moreover, the legislature's comparative advantage over courts in addressing complex policy questions is less pronounced in many states than in the federal system, because state legislatures often lack the research resources that Congress has.

State court decisions form part of an ongoing process of constitutional interpretation by citizens and all three branches of a state government, rather than pronouncements of fixed principles. Unlike federal judges, many state judges stand for election. Perhaps most importantly, state constitutional decisions are relatively easy to

Believing that schools were “indispensable to the continuance of a republican government,” Mann defined an adequate education as one that prepares all individuals to carry out complex civic duties, far beyond formal requirements of voting or jury service.

Mann's ideology represented many school reformers who successfully pushed common school laws and education clauses throughout the Northeast and Midwest in the mid-1800s. Reformers, and the publics they convinced, believed that “morality was the most important goal of common education” and that “moral education...overlapped citizenship education.”

At the same time, state regulation

Believing that schools were “indispensable to the continuance of a republican government,” Horace Mann defined an adequate education as one that prepares all individuals to carry out complex civic duties, far beyond formal requirements of voting or jury service.

overturn through amendment.

Beyond using education adequacy cases to check the legislature, state courts should interpret education clauses in their national context. While one state's interpretation may legitimately vary from another's based on a different history, state courts would lose valuable resources if they did not look beyond their borders to the history and interpretation of other states' similar clauses.

The history of education articles leads to the conclusion that contextual interpretation is appropriate for these clauses. State constitutional drafters operated in the context of education clauses developing in other states, and referenced these other clauses in their deliberations. For instance, the record of New York's 1894 constitutional convention (which adopted its education article) makes clear that New York framers equated their clause with similar clauses in other states.

Education History Supports a Strong Citizenship-Based Interpretation of Education Articles

More than any other individual, Horace Mann defined the theory behind public schools in the 1800s. At a time when many states, responding to Mann's movement, passed such clauses, Mann believed that education clauses mandated an education adequate enough to prepare citizens.

became an important force in education. States codified an ideology that saw uniform, quality public schools as crucial to state government and inextricably linked to America's continued growth and success. The era's central policy changes revolved around increasing state control and consolidating small school districts in order to ensure a minimum level of quality and consistency.

From Education for Democracy to Achievable Remedies

Defining adequacy in terms of preparing democratic citizens provides significant guidance to courts in determining what evidence of adequacy is most valuable—evidence of inputs. To fulfill the goals of education clauses, citizens must have the capability to understand the various complexities of public issues. The complexity of such issues is more probative than the level at which they are typically discussed. Thus, in a point properly overturned on appeal, the Campaign for Fiscal Equity appellate court erred in giving any weight to the state's assertion that an eighth-grade education was adequate because most jury instructions and newspaper stories about elections and political issues were written at an eighth-grade level. Evaluating whether the United States should go to war with a particular country, for example,

calls for an understanding beyond that of an eighth grader, regardless of the level at which newspapers present the issues.

An adequate education for younger children entails teaching fundamental skills, such as reading, writing, and basic math, and the critical thinking skills necessary to understand complex adult issues. Similarly, an adequate education for older children must present subject-area material that enables them to think critically about related issues beyond school walls.

Finally, while the point may seem too obvious to belabor, education clause framers envisioned a set of school buildings set off from the rest of society where children would go to learn. Thus, adequacy entails decent school buildings, a requirement that many courts have recognized.

Once a court has defined educational adequacy, crafting a specific remedy should present little difficulty: The court should order the state to provide whatever input it found inadequate.

The above framework also should encourage plaintiffs to think creatively about desired remedies. Schools unable to provide decent school buildings or textbooks reflecting a modern curriculum can sue seeking sufficient funds to provide such resources. Schools unable to pay sufficient salaries to attract qualified teachers can sue for teacher recruitment and retention funds. Understanding adequate inputs as the proper measure will help courts resist the impulse in school funding cases to consider equal funding a suitable remedy. Because poorer children tend to arrive at their first day of school at age five or six already behind their middle- and upper-class peers, school districts require more resources to educate them adequately.

Beyond fiscal remedies, plaintiffs could seek a state takeover of a chronically mismanaged school or district. Plaintiffs could seek changes to management practices, requirements that the state ensure some measure of teacher quality, provision of early childhood education, or racial and economic integration.

Conclusion

State courts can consider their own history and the history and development of education clauses and education theory in other states. Such an analysis leads to the conclusion that an adequate education builds sufficient basic skills and critical thinking necessary to understand, appreciate, and form opinions regarding the complex issues that they will encounter as voters, jurors, and citizens. If state courts adopt this approach, they will go a long way towards ensuring an adequate education for all children. ■

The Problem of Retroactivity

BY DAVID LEHN ('04)

The note excerpted below was published as "Adjudicative Retroactivity as a Preclusion Problem: Dow Chemical Co. v. Stephenson" in the NYU Annual Survey of American Law (2003-2004), where David Lehn was managing editor. He won the Seymour A. Levy Memorial Award, which recognizes the most outstanding student writing published in the Survey, and also the Law Review Alumni Association Award, given to the student with the second-highest cumulative grade-point average. Writing under then-Russell D. Niles Professor of Law Larry Kramer's guidance, Lehn confesses to writing and rewriting this note five times, each version a complete rejection of the previous one. This fall Lehn joins Cleary, Gottlieb, Steen & Hamilton in New York City as an associate.

This past term, *Dow Chemical Co. v. Stephenson* presented the Supreme Court with a new question of retroactivity. The plaintiffs collaterally attacked an Agent Orange class settlement, arguing that they had not been adequately represented, and that therefore they were not bound by the settlement. The Court of Appeals for the Second Circuit agreed, basing its decision on the Supreme Court's holdings in *Amchem Products Inc. v. Windsor* and *Ortiz v. Fibreboard Corp.* Both *Amchem* and *Ortiz* were decided long after the events that gave rise to the Agent Orange litigation, as well as after the Agent Orange class certification, settlement, and direct appeals. Thus the appellate court applied *Amchem* and *Ortiz* "retroactively" to permit relitigation of a suit that was already final. An equally divided Supreme Court affirmed without discussion. In this article I consider *Dow's* unresolved question: should the appellate court have applied *Amchem* and *Ortiz* retroactively? In order to do so, I must examine the problem of retroactivity, that is, by what rule or principles should a court answer a given retroactivity question?

It seems natural for a court to apply existing law to adjudicate the dispute before it. But what should a court do if between the time the parties acted and the time the court adjudicates their dispute, the instant court or another court changes the relevant law—should it dispose of the case under the "new" law or the "old"? Justice Holmes, for example, thought that new law should be applied retroactively, but the Warren Court sometimes overruled a precedent but disposed of the case before it according to the old law and reserved the new law's effect for future conduct. During the past 50 years, the Court has frequently changed its approach to the retroactivity problem.

In order to understand the Court's various retroactivity rules, one must understand two distinctions that the Court has often considered significant. The first pertains to whether the court confronts the retroactivity question in the same case in

which it changes the law or in another case. A court can create new law by confronting an issue of first impression, or by overruling or modifying precedent. Whenever a court creates new law, it generates a retroactivity question with respect to the disputed transaction it is adjudicating. The court must decide whether to apply its new law or the law that existed at the time that the parties acted. This may be termed the "law-changing retroactivity question." That court also generates a retroactivity question for all other disputed transactions that preceded the law-changing decision. Courts adjudicating these other disputes must decide whether to apply the new law that the first court created or the law that existed at the time that the parties to these other disputes acted. In these other cases, it may be said that the change in law "intervened," thereby creating a "subsequent retroactivity question."

The second distinction is between pending and final cases. Final cases are those "where the judgment...was rendered, the availability of appeal [was] exhausted, and the time for petition for *certiorari* has elapsed before [the law-changing] decision." Pending cases are those that are not yet final but whose underlying conduct occurred prior to the law change.

These two distinctions, or dichotomies, are mutually independent. Law-changing retroactivity questions can arise in both pending and final cases, as can subsequent retroactivity questions.

Driving the evolution of the Court's retroactivity jurisprudence has been the Court's shifting treatment of a handful of principles. One principle is the "judicial power" institutionalized by Article III of the Constitution. Another is a principle of equality, that a court should treat similarly situated parties similarly. A third is that reliance interests should be protected. And a fourth is that finality interests should be protected. Frequently, the Court has turned to the doctrines of *stare decisis* and *res judicata* to protect the reliance and finality interests. Finally, the Court has also struggled with the choice between *per se* rules and balancing tests.



David Lehn ('04)

In this paper, I argue that the retroactivity rule should be the same regardless of whether the court confronts a law-changing retroactivity question or a subsequent one, and regardless of whether it confronts the retroactivity question in a case that is pending or in one that is already final. Further, the retroactivity rule should be a reliance-based cost-benefit test, with a rebuttable presumption in favor of prospectivity, in other words, in favor of withholding the new law's effect from disputes that occurred prior to the change in law.

II. Article III and the Judicial Power

A. Finding Law and Making Law

One central debate about retroactivity revolves around whether courts find law or make law. According to the declaratory theory, law is objective and constant. A change in law is really a correction: the previous statement of law simply resulted from "a failure at true discovery"; the "old" law was "never the law." Some justices have thought the theory implausible, but Justice Scalia continues to espouse a version of the theory. While Justice Scalia does not consider himself "so naïve...as to be unaware that judges in a real sense 'make' law[,]...they make it as judges make it, which is to say as though they were 'finding' it—discerning what the law is, rather than decreeing what it is today changed to, or what it will tomorrow be."

Neither Justice Scalia nor any other proponent of the declaratory theory, however, ever fully explains why the declaratory theory solves the retroactivity problem. The intuition seems to be that because the law does not actually change, the "new" law was in fact always also the "old" law, and consequently there is no retroactivity problem at all.

This intuition is flawed. Even if the declaratory theory is valid, it still does not solve the retroactivity problem. This intuition overlooks the legitimate role that preclusion doctrines play in the legal system. Preclusion doctrines implicitly distinguish between decisions *now* and decisions *then*. They preserve the old decision for valid prudential reasons even if the court might reach a different result on the merits if it could hear the claim anew—indeed, even if on the merits the case was wrongly decided. Yet their preclusive function is not inconsistent with the declaratory theory. They do not require that the law has "changed." For example, a court may adjudicate a dispute but obtain the wrong result because it misapplied the law; a later court hearing a collateral attack might arrive at a different result if it could, but *res judicata* precludes it from doing so.

The problem of retroactivity is best conceptualized as a preclusion problem. Accordingly, a retroactivity rule, too, may legitimately bar relitigation even though the court would decide the case differently under the new law. Just as the *res judicata* bar is consistent with the declaratory theory, so too is prospectivity as a bar on applying new law.

The counterpart to the declaratory theory is the positivist theory, which acknowledges that courts do indeed make law. Once courts have this power, it is possible, unlike with the declaratory theory, to distinguish "new" law from "old." Decisions under the old law become "existing juridical facts," which militate in favor of withholding the new law's effect. Nevertheless, it is sometimes claimed that even if courts can make

law, Article III still mandates retroactivity because of what may be termed the "best law" rule. As the Court said in *Griffith*:

If we do not resolve all cases before us on direct review in light of our best understanding of governing constitutional principles, it is difficult to see why we should so adjudicate any case at all... In truth, the Court's assertion of power to disregard current law in adjudicating cases before us...is quite simply an assertion that our constitutional function is not one of adjudication but in effect of legislation.

Justice Blackmun put the point in the obverse: a court may not apply a law already "determined to be wrong."

Yet the best law rule also fails to solve the retroactivity problem because it does not recognize the legitimate role of preclusion doctrines. That a court hearing a collateral attack would decide the case differently were it open to relitigation does not undermine the legitimacy of the *res judicata* bar—indeed, that is the very point of *res judicata*. And the doctrine of *res judicata* itself is surely part of the best current law. Therefore, the *res judicata* bar does not entail applying anything less than the best current law. Once the retroactivity problem is understood as a preclusion problem, it is clear that prospectivity does not entail the application of "wrong" law either.

Therefore, the debate about whether courts find law or make it is irrelevant to the retroactivity problem. Neither the declaratory theory nor the best law rule is inconsistent with prospectivity. ■

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STUDENT NEWS

Rave Reviews for Law Revue

The popular student production returns to the Tishman Stage and makes the grade once again

Forget about *Law Review*. Springtime at NYU is all about Law Revue, the annual musical send-up of the Law School. This year, *Ricky and the Lawyer Factory* came to the Tishman Auditorium for four nights—and played to an extremely appreciative audience.

A takeoff on *Charlie and the Chocolate Factory*, *Ricky* is the story of five lucky students (played by Deepa Janakiraman, '05; Hillary Noll, '04; Margo Kaplan, '04; Mitchell Kent, '05; and Kelly Jordan, '04) who win a magical tour of the new Law School building with the quirky Dean Ricky Wonka (Arthur Dobelis, '05). As they travel through the school, the students and everyone they meet poke fun at all aspects of law school life. In one scene, law students who want to start a new journal are so desperate for hard-to-come-by supplies that they end up fighting over ink toner. Elizabeth Loeb, '04; Erica Alterwitz, '05; Eve Moskowitz, '05; Catherine Cugell, '04; Krupa Desai, '06; Casey Cohn, '04, and Gillian Burgess, '06, had the audience roaring with their hilarious slap-stick fisticuffs. Another scene parodied the wide variety of courses and seminars

available to law students: Professors Rachel Barkow (Heather Childs, '06), David Richards (Ariel Joseph, '06), Rochelle Dreyfuss (Robin Effron, '04), Noah Feldman (Joseph Treloar, '04), Linda Silberman (Meredith Stead, '06), and Barry Friedman (Rob Elder, '04) sang and danced their way through a discussion of the merits of a Colloquium on Law and Interpretive Dance. Even real professors got into the act: Dean Richard Revesz and several other members of the faculty made cameo appearances discussing their “methods” of choosing grades, such as dropping papers from the stairs.

High Note

The heart of the revue is always the music—and *Ricky's* numbers were terrific. The show opened strongly with a spoof of the *Erie* doctrine, the Supreme Court, and the

Root-Tilden-Kern program sung to the tune of U2's “Beautiful Day”. Other musical highlights included a takeoff of *Fiddler on the Roof's* “Matchmaker,” in which students asked Gail Cutter, then-director of career counseling and placement, to strike them a match with a prestigious law firm; and an entertaining rap, “Damn, It Feels Good to Be a Third Year,” delivered with flair by Kent and Emily Bushnell ('05). *Ricky and the Lawyer Factory* ended with a flourish, with the cast's own rendition of “Higher and Higher.” They sang “Our law is lifting us higher than we've ever been lifted before. Let's keep it up when things look dire; we'll have NYU pride forever more.” The rousing chorus brought the audience to its feet. Law Revue definitely passed with flying colors. ■



Sold-Out Performance: Cast members of the 2004 Law Revue

Dewey and Skadden Make Generous Donations

Dewey Ballantine for Diversity

Law firm Dewey Ballantine LLP and its diversity committee made a gift of \$125,000 to the NYU School of Law in June. For five years, the Law School will award a Dewey Ballantine LLP Scholarship to two students from underrepresented populations who show both academic aptitude and need.

In 2004, the scholarships will be given in the amount of \$10,000 each to two J.D. candidates, one beginning his or

her first year, the other beginning his or her second year. Additionally, \$5,000 will be allotted during this period to the Law School's Office of Student Affairs

for distribution for programs that support diversity awareness.

Dewey Ballantine partners Richard Shutran ('78) and Janis Meyer worked closely with the Law School to facilitate the gift. “Dewey Ballantine is delighted to have the opportunity to work with the Law School to support initiatives promoting diversity,” said Meyer. “We look forward to continuing our dialogue with the NYU School of Law community on issues of diversity awareness.”

Skadden Arps Supports Scholarship

The Black, Latino, Asian Pacific American (BLAPA) Law Alumni Association Public Service Scholarship, established in 1994 to promote the practice of law in the public sector by graduates of the NYU School of Law, got a contribution from Skadden, Arps, Slate, Meagher & Flom LLP's Diversity Committee this year.

Tiffany McKinney ('01), an associate at Skadden, contacted the firm's Diversity Committee about the scholarship and provided the Law School with an introduction to the firm's Diversity Manager, Edwin Bowman. McKinney was alongside Bowman when he presented a check for a \$3,500 scholarship to Linda Gadsby ('92), president of BLAPA, at the Fall Mentorship Reception.

At the BLAPA Annual Dinner on April 2, 2004, Bowman announced that the Skadden-funded scholarship was being offered to Ming Chen ('04). Chen's public service portfolio is impressive, including her commitments to NYU's APALSA (Asian Pacific-American Law Student Association) and civil rights litigation work at the Department of Justice, the Equal Employment Opportunity Commission and the NAACP. This fall, she is clerking for Judge James Browning on the United States Court of Appeals for the Ninth Circuit in San Francisco. ■



Richard Shutran ('78)

Kirkland & Ellis, Ten Years of Funding Public Service Projects

As a student at the NYU School of Law, Oona Chatterjee ('98) says she "was not the person in the front row with my hand up all the time."

She was, however, up to her elbows in work. When welfare reforms slashed benefits in the mid-1990s, leaving hundreds of New York residents ineligible for food stamps, Chatterjee became consumed with helping to offset the consequences.

A local pastor offered Chatterjee and fellow Law School student Andrew Friedman ('98) space in the basement of his Bushwick, Brooklyn church, and they happily accepted and began holding legal rights workshops for the diverse, largely immigrant community. Chatterjee made the most of her Law School connections, working with professors and utilizing NYU programs to ground her work.

Her group, called Make the Road by Walking, now has nearly 900 members, 15 full-time employees, and 12 part-time workers. The organization is working on projects

related to workplace justice, economic justice and democracy, environmental justice, youth power, and gay and lesbian empowerment.

"I was drawn to NYU in part because of the school's stated commitment to public interest work," she said, adding: "and I found many of NYU's resources to be very valuable. The Brennan Center Public Policy Advocacy Clinic was the foundation of this organization."

In the beginning, says Chatterjee, "we were working for free and living off our student loans." Then in 1998 she won the Kirkland & Ellis Fellowship, which entitled her organization to \$40,000 disbursed as a salary for the duration of the fellowship.

"Kirkland & Ellis was one of the first to believe in this organization enough to put funding into it," said Chatterjee. "It meant we could work and actually get paid."

The Kirkland & Ellis Fellowship was established in 1995, when the firm made combined gifts of \$1 million to the NYU

School of Law and Columbia Law School. Each year, Kirkland & Ellis picks one student from the Law School and one from Columbia for a year of postgraduate law-related public service in New York City.

"The Kirkland & Ellis Fellowships reflect our dual commitments to New York City and to public service, and arose from the strong desire of our partners to make a meaningful contribution to New York City life," said Patrick Gallagher, a partner at the firm. "The fellowships are intended to put law school graduates to work meeting serious human needs."

Deborah Ellis ('82), assistant dean for public interest law and an adjunct professor of law, sat on the fellowship panel in 1998 and remembers Chatterjee well. "Oona really stood out," she said. "She is wise beyond her years in a dramatic way. I was so impressed by her that I went home and wrote out a check to her organization. I've been contributing ever since." ■

Scholarship Reception



Above: Kelia Cummins ('05), the John D. Grad Scholar, at center, celebrates with fellow scholars at the Scholarship Recipients and Donors Reception. Held in Greenberg Lounge on November 11, 2003, the reception boasted an unprecedented turnout and featured Cummins, who spoke about her experience as the John D. Grad Scholar, and alumnus Kenneth Heitner ('73, LL.M. '77), who talked about the history of the Alex E. Weinberg Fellowship.

Top right: Norma Z. Paige ('46), an esteemed member of the New York University School of Law Board of Trustees and a great friend and benefactor of the Law School, meets the Paige Scholars. The Paige Scholarship benefits talented law students with financial need and is a part of Mrs. Paige's tradition of philanthropy at the Law School, which includes the prestigious Paige Annual Survey Prize as well as the Norma Z. Paige Scholarship and the Norma Z. Paige Professorship.

Bottom right: Robert M. Frehse Jr. (right), vice president and executive director of the Hearst Foundation, with a Hearst Foundation Scholar. The Hearst Scholarship supports outstanding under-represented law students with financial need.





Left to right: Professor Oscar D. Chase, president of the NYU chapter of the Order of the Coif, Dean Richard Revesz, Helene Kaplan, honorary inductee of the NYU chapter of the Coif, and Mrs. Kaplan's husband, Mark Kaplan.

Outstanding Students and an Alumna Inducted to the Order of the Coif

Proud family members, teachers, and friends gathered to honor the latest provisional members of the Order of the Coif, the national honorary society dedicated to encouraging excellence in legal education. Based on an honor originally given to the most prestigious of England's barristers, it counts the top 10 percent of each NYU School of Law graduating class among its members.

In his remarks to the families of the new members of the Order, Vice Dean Stephen Gillers ('68) called honoring the inductees one of his three favorite moments at the Law School each year, along with orientation and graduation. He described the experience as "heartening," because, as a father, he could appreciate the pride that the parents of the inductees felt for their children.

After the presentation of the provisional members, Dean Richard Revesz presented NYU alumna Helene Kaplan ('67) with an honorary membership to the Order of the Coif. Revesz described Kaplan as one of the Law School's "most distinguished alumnae" and a leader of the bar, corporations, and philanthropy, calling the new group of provisional members "Helene Kaplans in training."

After graduating from the Law School, Kaplan worked as a solo practitioner before joining Webster & Sheffield in 1978, where she was a partner until being named of counsel in 1985. Kaplan joined Skadden, Arps, Slate, Meagher & Flom in 1990 and is of counsel for the firm, representing non-profit organizations and individuals with substantial philanthropic interests.

Outside the world of law, Kaplan serves as a director of ExxonMobil Corp., J.P. Morgan Chase & Co., May Department Stores Co., and MetLife Inc. She is also currently serving a second term as chair of the board of the Carnegie Corporation of New York and is a trustee and vice-chair of the American Museum of Natural History, the Commonwealth Fund, and the J. Paul Getty Trust.

Kaplan attributed her many substantial achievements to the "incredible support" of her husband, Mark Kaplan, a fellow attorney. She said that her degree from NYU opened doors she had "never imagined," and that her admission to the Law School was a "transforming event" in her life. ■

NYU Grad Tops Texas Bar Exam

When Sanjeev Ayyar (LL.M. '04) prepared to take the Texas Bar Exam, he had every right to be confident. After all, he had already passed the test in California, New York, and New Jersey. But instead of taking it easy, Ayyar, who had just finished the LL.M. program at the NYU School of Law, hit the books.

"Fear is a great motivator," he said. "Even though I've taken four bar exams, I've given 100 percent to each one. It's an all-or-nothing kind of test."

His hard work paid off. Ayyar scored higher on the exam than anyone else in Texas. He was honored with a tour of the state's Supreme Court, where he was asked to speak at the swearing-in ceremony for new Bar members. Ayyar's speech focused on the many benefits of practicing law. "We often hear that it's fashionable to be frustrated with the many demands and pressures of being a lawyer and trying to maintain life's balance," he said. "But as we reflect and gain perspective, we recognize that it is a privilege."

The first lawyer in his immigrant family, the 29-year-old Ayyar is quick to attribute his success to his support network. He also gives full credit to his wife, Sandhya, a tax accountant who passed the CPA exam, for her understanding when he studied through the night and came home "tired and cranky."

Ayyar spent his undergraduate years at Carnegie Mellon University, then graduated cum laude from University of California, Hastings College of the Law with a J.D. in 2000. He took his first bar exam in California before securing a job at Gray Cary Ware & Freidenrich, a Silicon Valley law firm. Upon his acceptance to the NYU School of Law in January 2003 for an LL.M. in taxation, he prepared for possible employment by taking the New Jersey and New York bar exams, but never practiced in either state. Instead, he focused on his education.

"If you want to do an LL.M. in taxation, clearly NYU is number one without a doubt," Ayyar said.

Currently practicing at Cox & Smith in San Antonio, Ayyar says he feels lucky to have a career that allows him to combine his interest in finance with his natural people skills.

"My undergraduate background is finance-oriented," he said. "I always liked it, and wanted to have a career in it."

But his experience in tax law has far surpassed his expectations. "I had the idea of a tax attorney as a guy with green eye shades, crunching numbers," he said. "But it's not like that at all. It's much more fact-specific, and very intellectually demanding."

It's also a surprisingly social career, based largely on the ability to communicate clearly. "My job is not about numbers, it's about people and their businesses. You're trying to understand them and plan for them, and I find that fascinating. It's really about the relationships you have with the client."

Despite achieving the highest bar score in Texas, Ayyar remains modest, insisting, "I'm just glad I passed." ■



Sanjeev Ayyar ('04)

Recent Graduate Honored with Justice Jackson Award

New York University School of Law graduate Harlan Cohen ('03), was awarded the Washington Foreign Law Society's Justice Robert H. Jackson Award for his massive 578-page essay, *The American Challenge to International Law: A Tentative Framework for Debate*.

The award, named in memory of the preeminent U.S. Supreme Court justice who was also a member of the Nuremberg tribunal, is sponsored by law firm Chadbourne & Parke. The \$2,500 prize is awarded for the year's best published student article tackling international or comparative law.

Cohen's essay appeared in the *Yale Journal of International Law*, having been chosen for publication by the Yale Young Scholars Symposium. The symposium selects one article for publication each year.

Cohen addresses the hypocrisy that

seems to characterize U.S. foreign policy. Among other instances, he cites America's backing for the Nuremberg, Yugoslavia, and Rwanda tribunals with its opposition to the International Criminal Court, and the U.S. refusal to ratify the Comprehensive Test Ban Treaty, despite its railing against states for developing weapons of mass destruction. He argues that the contrast between American support for the creation of the United Nations, and its unilateral advance on Iraq, is only the most recent example.

Cohen suggests that in light of the history of American international relations, U.S. inconsistency points to something more dangerous than mere pragmatism. "Such divergent actions may actually be informed by a coherent, specifically American conception of international law."

This is a conception, he explains, that



Justice Robert H. Jackson Award winner, Harlan Cohen ('03)

stems from a U.S. founding ideology that presupposes itself as the only truly legitimate state in the world. "During more isolationist phases, the United States, suspicious of the dangerous outside world, uses international law as a shield to protect its borders and its citizens. When roused to intervention, however, America girds itself in its utopian mission and takes action on behalf of the world's 'oppressed' people, asserting the illegitimacy of the states against which it fights." Cohen cites President Bush's recent ultimatum to the Taliban, Clinton's speech on Kosovo, Wilson's address to Congress, and McKinley's declaration of war against Spain.

His insightful essay concludes that ideology inevitably shapes the conception states have of international law, and that this obstacle must be overcome in order for international law to be truly global. Cohen suggests that to deal with this challenge, "international law needs to be seen less as a body of neutral principles waiting to be discovered, and more as a dynamic and interactive process of law creation. International lawyers must take an active role in the construction of an international order that builds upon, interacts with, and can eventually even reshape state ideology."

Cohen said in an interview that "the goal should be to bring the U.S., and every other state for that matter, to the point where they follow international law because they feel committed to it, not because any institution has forced it upon them."

"Harlan's piece is a nuanced intellectual history of American foreign relations. This is a mature and impressive piece of work from a promising scholar," said Cohen's former teacher, constitutional law expert, Barry Friedman, NYU's Jacob D. Fuchsberg Professor of Law. ■

NYU School of Law Students Win More Accolades

Manish Kapur ('04) and Aaron Arun Dhir ('04) were selected, respectively, as "emerging scholars" and finalists in the North East People of Color Legal Scholarship Conference Emerging Scholars Competition.

Kapur was chosen as one of only two "emerging scholars" for his thesis entitled "The Use Regulation in Houston Contradicts the City's Free Market Reputation."

Dhir was selected as one of four finalists for his paper "A Critical Analysis of the Proposed Disability Rights Convention and the Application of International Human Rights Norms to Persons with Mental Disabilities."

Tye Klooster ('04), an NYU School of Law LL.M. taxation student, won first place in the 2004 Mary Moers Wenig Student Writing Competition. The competition, which is in its first year, is run by the American College of Trust and Estate Council and was established to encourage scholarship in the area of trusts and estates.

Klooster's paper entitled, "Are There Any Justifications for the Rule Against Perpetuities That Are Still Persuasive? A Survey of the Modern Policy Arguments Cast For and Against Retention of the Rule Against Perpetuities," was chosen out of 14 submissions from 13 law schools. The award includes a prize of \$5,000 and publication of the winning submission in the fall edition of the *ACTEC Journal*.

Erik Bluemel ('04) was awarded second place in the 2004 Roscoe Hogan Environmental Law Essay contest. As part of the award his paper entitled, "Evaluating the Effectiveness of Conservation Easements in Wetlands Preservation," appears in the *Vermont Journal of International Law*.

This year's recognition also went to recent NYU School of Law alumni David S. Koller ('03) and Rachel E. Rosenbloom ('02), for work they did as students at the Law School.

Koller was awarded the 2004 Human Rights Award by the Washington College of Law Academy on Human Rights and Humanitarian Law. His prize-winning paper, "Immunities of Foreign Ministers: Paragraph 61 of the Yerodia Judgment as It Pertains to the Security Council and the International Criminal Court," was originally written for Murry and Ida Becker Professor of Law Thomas M. Franck's class on constitutional law and the United Nations.

Rosenbloom, an editor of the Law School's *Review of Law and Social Change*, was cited four times in a ruling by the U.S. Court of Appeals for the Ninth Circuit in *Armentero v. INS*. Her article, which was extensively relied on in the decision, considered whether the immediate custodian rule should apply in immigration cases. She developed her interest in the area as a student in the NYU School of Law Immigrant Rights Clinic. Rosenbloom was a Root-Tilden-Kern Scholar and graduated as a member of the Order of the Coif.

Going, Going, Gone!

Public Service Auction succeeds in its bid to raise money for students' summer internships

Want to help fund summer internships at nonprofit organizations and have some fun at the same time? Attend the annual NYU School of Law Public Service Auction, where you can win Super Bowl tickets, vacations to Jamaica, helicopter rides, and even a weekend at a professor's country house.

The Public Service Auction, held every February, raises money to fund students who take summer internships at public interest and public service organizations. This year the Law School's Public Interest Law Center received more than 470 applications for summer funding, the largest number since the auction began in 1994. "Each student seeking funding is required to help out with the auction in two crucial ways," said Helena Wolin ('05), one of the co-chairs of the Public Service Auction Committee. "First, they literally pound the pavement going from business to business asking for donations to auc-

tion off. Second, they help out at the actual event selling tickets, tending bar, or whatever else needs to be done. The students have a vested interest in making the auction a great success and this active participation goes a long way to help raise that scholarship money?"



Assistant Dean for Public Interest Law Deb Ellis ('82), in clown mode, makes balloon hat for Auction Co-Chair Mari Bonthuis ('05) at the February 26, 2004 Public Service Auction.

The list of lucky winners was long and their prizes often luxurious. Bart Dzikowski went home with U.S. Open tickets for \$1,000; Christine Kornylak ('02) snagged NASCAR tickets for \$550; Therese Craparo ('02) won the helicopter ride for \$350; the weekend at Professor Richard Stewart's five-bedroom farmhouse in the Hudson Valley went to Jennifer Weiers ('04) for \$500. Meanwhile, Rajeev Ananda ('05) got a trip to Jamaica for \$3,600, and Anita Weber, a Law School parent, scored Super Bowl tickets for \$4,200. The evening ended with an obstacle course race across the stage of the auditorium: Dean Revesz and his wife, Vicki Been ('83), Elihu Root Professor of Law, went up against a team sponsored by the winning bidder, Deborah Ellis ('82), assistant dean for public interest law, who paid \$550 for the chance to beat the dean. Her team's effort fell short, however: The dean and his wife won, and were crowned king and queen of the obstacle course to the enthusiastic cheers of the crowd. "The greatest part of the auction is how it brings together students, faculty, and alumni in an informal atmosphere," said Mari Bonthuis ('05), co-chair of the event. "Everyone is out to have a good time and help raise money for the students; the feeling of community that is fostered on this night is truly incredible." ■

Krupa Desai: Woman on a Mission with Help from PILC Grant

NYU School of Law prides itself on the number of students who choose to pursue public service law, both during the summers between terms, and after graduation. Many faculty members and students believe strongly in the potential for public interest advocacy to achieve some of the profession's highest ideals.

Krupa Desai ('06) is one of them. Those outside the legal world often assume that top law students immediately grab summer slots with high-end law firms. But Desai, like many of her classmates opted to do something different. She headed west to spend the summer doing grass-roots advocacy work for Bet-Tzedek, a nonprofit in Los Angeles.

"I see law as a tool to affect social justice. I wanted to go to law school before I worked for Teach for America, but that experience really fueled the fire," she said.

The Law School is well known for its support of public interest advocacy both through its Public Interest Law Center and through the Root-Tilden-Kern Scholarship Program, which funds legal training for prospective public interest lawyers. Support for public interest advocacy at the Law School was further

strengthened last year with the introduction of guaranteed Public Interest Law Center funding for any first- or second-year public interest internship. Desai was one of more than 300 Law School students who this year decided to use a grant.

Bet Tzedek is Hebrew for "house of justice." The organization, which is funded by a broad base of state, corporate, and private contributors, was founded by volunteers 30 years ago as a law clinic providing pro bono legal services to the most vulnerable members of the local community. Since then, it has grown from a one-evening-a-week drop-in center to one of the country's foremost providers of legal services. There are now more than 30 affiliated centers throughout Los Angeles County catering to more than 10,000 people.

One of the advantages that public sector internships have over those in the private sector is the level of responsibility given to interns. "It's working out really well," said Desai. "It's very practical. I'm dealing with civil legal services and issues related to public benefits,



Krupa Desai ('06)

Social Security, and disability benefits. I am currently working on a brief for a client who has been denied Medicare after serious surgery. It's a great follow-up to our first-year lawyering course; I can really put what I learned into practice."

But it's a tough decision for young lawyers to enter the public interest sector. Recent graduates are faced by a financial double disincentive—soaring post-law school debt combined with the lure of corporate pay packets. The imbalance of resources between public and private firms makes itself felt even before graduation. Second-year interns in corporate law offices can expect to earn upward of \$2,500 a week; public interest internships, by contrast, are largely unpaid (except for the Law School's funding).

The Bet Tzedek internship comes after Desai's first year at the Law School. She is considering applying for term-time internships to gain as much experience as possible in the two years before she graduates. Although she intends to round out her experience by spending a summer working for a private law firm, eventually Desai plans to return to public practice. ■

And the Winner Is...

Robert Fitzpatrick ('04) triumphs in 18th Annual Marden Moot Court Competition

The judges were real, even if those arguing in front of them weren't actually lawyers yet. Presiding over this year's Orison S. Marden Moot Court Competition were the Honorable Judith Smith Kaye

(LL.B. '62), chief judge, New York State Court of Appeals; the Honorable Pierre N. Leval, United States Court of Appeals for the Second Circuit; and the Honorable Diarmuid F. O'Scannlain, United States

Court of Appeals for the Ninth Circuit. Playing the part of lawyers were finalists Robert Fitzpatrick ('04), Kristina Medic ('05), Lauren Stark ('05), and Christopher Pelham ('05).

The case was about a police officer who stopped a possible drunk driver who was on his way to deliver jewelry to a retailer. As the officer searched the driver's van, he stole some of the jewelry. He then let the driver go after taking a

bribe. Two legal issues were in play before the moot court: First, can the bribe be charged as a federal crime since the policeman is an agent of a state organization that receives federal funds? Second, how should the stolen property be valued, by its wholesale or retail price? The answer to that question could determine the length of a sentence the officer might receive. The answer was hardly clear cut, as Judge Kaye conveyed when she asked Pelham, "Mr. Pelham, honestly, does anyone ever pay full retail price for diamond earrings?"

Although Medic, Stark, and Pelham performed well, each making their points articulately, it was Fitzpatrick who won over the judges. Arguing for the appellant (defendant), he said the crime could be considered a federal offense only if there were a connection between the crime and the funds received from the government. Anything else, he insisted, "threatens to expand the federal government's prosecutorial powers."

The judges awarded him the prize of Best Oralist. That was quite an honor, considering that Judge O'Scannlain ended the afternoon by remarking, "The quality of performance that we saw here today is well above the average quality I see on the Ninth Circuit Court of Appeals." ■



Robert Fitzpatrick ('04) looking the part.

The One-Man Think Tank

Annual Survey dedicates its 61st volume to prolific Judge Richard A. Posner

The *NYU Annual Survey of American Law* dedicated its 61st volume to Judge Richard A. Posner of the United States Court of Appeals for the Seventh Circuit, who is one of the most prolific legal scholars of our time. The Law School celebrated the dedication with a ceremony hosted by the *Annual Survey*, featuring tributes to Judge Posner and remarks by the honoree.

Founded in 1942, *Annual Survey* is the Law School's second-oldest student-edited journal. Its articles analyze emerging legal trends, interpret significant recent court decisions and legislation, and explain leading legal scholars' and judges' perspectives on current legal topics. Each year the journal is dedicated to an individual who has made an outstanding contribution to American law.

Judge Posner fits that profile perfectly. Once described in *The Wall Street Journal* as "a one-man think tank," the judge is the author of over 30 books, 300 articles and essays, and more than 2,000 judicial opinions. In his spare time he is a senior lecturer at the University of Chicago School of Law, where he was also a professor before joining the bench.

Judge Posner was honored by Geoffrey Miller, the William T. and Stuyvesant P. Comfort Professor of Law at NYU; Robert A. Ferguson, the George Edward Woodberry Professor in Law, Literature, and Criticism at Columbia Law School; William F. Patry, a partner at Baker Botts, LLP, and an expert in intellectual property; Larry Kramer, the departing Russell D. Niles Professor of Law at NYU; and Judge Pierre N. Leval, United States Court of Appeals for the Second Circuit.

All those who spoke honored Judge Posner for his commitment to pragmatism both in law and in life and his tenacious drive for excellence. Professor Ferguson emphasized Judge Posner's ability to step across disciplines at will. Noting the judge's ability to write about subjects as diverse as literary theory and emerging technology, he said that Judge Posner is "not only our most frequently cited scholar, he is our most important one."

Judge Posner thanked both the *Annual Survey* for its recognition and his friends for what he called their "overly generous" words.



The Hon. Richard A. Posner thanks the *Annual Survey of American Law* staffers for honoring him.

"It is a great honor to have Judge Posner here and to dedicate this issue to him," said Editor-in-Chief Jonathan Slonim ('04). "Judge Posner has had an incredible influence on both legal practice and analysis, and we owe him a lot." ■

Worrying about Water in a Formal Way

Environmental Law Journal Colloquium examines water allocation issues

As pointed out by members of the event's first panel, the *Environmental Law Journal* Fall Colloquium on "Transboundary Water Allocation in the 21st Century" was held on the 164th anniversary of the completion of New York City's Croton aqueduct, which created the city's Upstate Water Supply. On October 14, 1842, the city held a "Croton Water Celebration" with parades and fountain displays marking the date that allowed New York City to grow, beginning the city's ascent to one of the great cities of the world. The all-day colloquium featured experts on water allocation at the intrastate, interstate, and global levels who discussed the power struggle over this vital resource.

The first panel, "Striking a Balance: New York City's Clean Water Needs and Their Effects on Upstream Land Use," featured authorities on New York's specific water issues. Currently, New York City does not need a man-made filtration supply for the billion gallons of water it uses daily because the landscape of the watershed upstream from the city acts as a natural filter. As the interests of the residents in and around the watershed areas lean toward expansion and economic development, the future of the natural filtration abilities of the watershed is in question. If too much of this natural area is paved over or replaced with manicured lawns and golf courses, more and more pollutants will run straight into the



Salman M.A. Salman, Lead Counsel, Legal Vice Presidency, the World Bank

supply, and several members of community groups concerned with the safety of the watersheds voiced their opinions during the question-and-answer session.

The colloquium's keynote address—"The Global Debate on Water Resources Management and Sharing: Why Has Consensus Proven Elusive?"—was delivered by Salman M.A. Salman, lead counsel for the legal vice presidency of the World Bank. Salman cited global water facts: The population of the world has more than tripled from 1.6 billion to over six billion during the last century; these six billion-plus inhabitants compete for the same amount of

Summit of the U.N. General Assembly, is within reach. In Salman's view, this goal can be a rallying point for future progress in the global debate on water resources.

A panel on "Defining the State and Federal Roles in Interstate Water Allocation" featured Pamela Bush, commission secretary and assistant general counsel to the Delaware River Basin Commission; Joseph Dellapenna, professor of law at Villanova University School of Law; Joseph Hoffman, executive director of the Interstate Commission on the Potomac River Basin; and George Sherck, associate at the International Water Law Research Institute at the University of Dundee in Scotland and adjunct professor at the University of Denver College of Law. The panelists offered views on current issues in the interstate water allocation debate—from the struggle over the use of the Chattahoochee River in Alabama, Florida, and Georgia, to the relative success of the Delaware River Basin Commission.

The colloquium closed with "New Perspectives on International Transboundary Water Allocation" featuring Dellapenna; Karin Krchnak, senior associate in the Institutions and Governance Program and the director of the Access Initiative and the Partnership for Principle 10 of the World Resources Institute; and Claudia Sadoff, lead economist of the World Bank Water Resources Management Group. The panel concentrated on the need for cooperation among nations that share clean water sources and new scholarship to suggest different paradigms for transboundary water management that focuses on the overall water needs of the interested parties. ■

The goal to reduce by half the number of people without sustainable access to safe drinking water by 2015 is reachable

water supply and New York City could be forced to create a filter system, which would cost billions of dollars. Panelists discussing these issues were Eric Goldstein (LL.M. '80), senior attorney and Urban Program Director of the Natural Resources Defense Council; Michael Principe, deputy commissioner and director of the Bureau of Water Supply, New York City Department of Environmental Protection; Daniel Ruzow, managing partner at Whiteman Osterman & Hanna; and Christopher Wilde ('99), watershed attorney for Riverkeeper. They also discussed the history and possible future of the three watershed areas that provide New York City's water

water; the problem is compounded by industrialization, urbanization, hydrological variability, and environmental degradations. Salman said that despite the efforts of the past 30 years, many aspects of the debate (particularly dams, the private sector's role in the international trade of water, human rights to water, and the issue of cooperation on international waters) have reached nowhere near a consensus. He ended, though, on the optimistic note that while middle ground has been difficult to reach, it's not impossible. He said that the goal to reduce by half the number of people without sustainable access to safe drinking water by 2015, which was set at the Millennium

Two New Student Journals to Publish

New York University School of Law will have two new journals this year—the *Journal of Law and Liberty* and the *Journal of Law and Business*.

Whether by design or accident, the new publications represent neatly contrasting approaches; one sets out to explore the ideological underpinnings of jurisprudence, the other is steeped in the nitty-gritty of business and finance.

The *Journal of Law and Liberty* will tackle the tensions between state control and civic freedom. The journal, whose first edition comes out this fall, will focus on the analysis of law from a classical liberal perspective.

Editor-in-Chief Robert Sarvis ('05), the former co-president of the Federalist Society, a group that advocates a conservative and libertarian interpretation of the law, intends to create a forum for debate among a broad readership. "We have a focus on ideology," he said, "but we don't have a bias toward it. We want to allow stu-



Robert Sarvis ('05)

dents to explore an approach to law that is lacking at NYU. I think NYU needs it?"

The *Journal of Law and Business* has a more pragmatic agenda. Editor-in-Chief David Chubak ('05) wants to give students the chance to explore private and corporate legal practice. As he told *The Commentator*, the Law School's student newspaper, in April, "Most students at NYU School of Law will work in a corporate setting at some point in their careers, yet there aren't many avenues open to discussing law and business or practicing corporate law."



David Chubak ('05)

Chubak has high aspirations for the journal; he cites his model as the American Bar Association's 60,000-circulation *Business Lawyer*. He aims to work closely with the business community and will commission articles not only from law professors, but also from working lawyers and corporate councils.

Despite their different approaches, both journals are trying to do something fresh. According to Chubak, the *Journal of Law and Business* will be the country's only student-run journal that targets professionals in its field, rather than academics and students, as its subscribers and contributors. The *Journal of Law and Liberty*, for its part, aims to fill a neglected space within the legal discourse. ■



Herbert Rubin ('42), fifth from the left, at the Rubin Symposium with panelists and members of the Executive Board of the *Journal of International Law and Politics*.

The Consequences of Force

The international repercussions of the use of force in Kosovo and Iraq was the topic of the eighth annual Herbert Rubin ('42) and Judge Rose Luttan Rubin ('42) International Law Symposium, sponsored by the *Journal of International Law and Politics*.

The first of three panels, "The Intervention by NATO in Kosovo: A Regional, Humanitarian Intervention," was moderated by Andreas Lowenfeld, the Herbert and Rose Rubin Professor of International Law at the NYU School of Law. Panelist Lori Fisler Damrosch, the Henry L. Moses Professor of Law and International Organization at Columbia Law School, contended that the United Nations became involved in Kosovo and Iraq in similar ways. In Kosovo, an initial violation of fundamental international norms was followed by a string of U.N. resolutions that were quickly violated, followed by the threat of further consequences by the U.N. and continuing violations by Kosovar leaders. Finally, the world community, or "collective will" as Damrosch termed it, failed to explicitly authorize military force. NATO then took unilateral action, an intervention that the Independent International Commission on Kosovo, which examined the Kosovo crisis including the U.N.'s role and NATO's decision to intervene, famously called "illegal but legitimate." Richard Goldstone, global visiting professor at the NYU School of Law and chair of the commission, said NATO's move created complex long-term challenges. He described the difficulties of restructuring a country with distinct and hostile ethnic groups.

The second panel, "The Future of the U.N. in the Regulation of the Use of Force," drew comparisons between unilateralism to resolve the hostilities in Kosovo and the 2002-03 crisis at the U.N. over Iraq. "The carefully crafted postwar multilateral diplomacy embodied in the U.N. is being trashed," argued Thomas Franck, Murry and Ida Becker Professor of Law Emeritus at the NYU School of Law.

Simon Chesterman, the executive director of the Law School's Institute for International Law and Justice, noted that NATO's unilateral experience in the Balkans taught the U.S. that it is unnecessary—and inconvenient—to seek U.N. approval for military intervention.

Did the U.S. have a legal right to intervene in Iraq because it believed Iraq possessed weapons of mass destruction? That was the question debated in "The Coalition of the Willing: a (Mostly) Unilateral Exercise of Preventative Self-Defense," moderated by NYU School of Law Professor David Golove. Miriam Sapiro ('86), the president of Summit Strategies International and a veteran international policy specialist, argued that the United States had no legal right to intervene in Iraq, insisting that a significant military intervention would require more than an implied military threat. Walter Slocombe, a senior adviser to the Coalition Provisional Authority in Iraq and former undersecretary of defense for policy under President Clinton, took the opposing view, arguing that the dangerous threat of weapons of mass destruction required early intervention. Ruth Wedgwood, Edward B. Burling Professor of International Law and Diplomacy at Johns Hopkins University, spoke more generally about the problem of self-defense, citing President Kennedy's preemptive show of force without a Security Council resolution to prevent the Soviet Union from delivering missiles to Cuba. "God gives you an ability to act against an attack, an intention, or a capacity," she said. "If you can't make a shield, you have to do one of these things."

Following the symposium, panelists and organizers had dinner with special guests including Judge Robert Katzmann of the U.S. Court of Appeals for the Second Circuit, Vsevolod Grigore, Moldovan ambassador to the U.N., and Judge David Trager of the U.S. District Court for the Eastern District of New York. ■

The Bottom Line: Profit v. People

Corporate accountability and human rights

The NYU Law Students for Human Rights, one of the campus's newest associations, held its first symposium this spring on the issue of corporate accountability and human rights.

Burt Neuborne, the John Norton Pomeroy Professor of Law at the Law School, delivered the opening address; three panels followed. The first discussion was "Theoretical Perspectives on Corporate Accountability." Professor Philip Alston began by stating: "What we've got is a strong disconnect between the theory and the practice." He attributed this problem to the fact that international law binds states, not corporations. Professor Peter Spiro of Hofstra University School of Law warned that "if corporations are not accountable to international law, then they are not accountable at all." Professor Catherine Kessedjian, from the University of Paris II and a member of the Law School's global faculty, rounded out the panel, suggesting that "we can fight for human rights from the private point of view...through private and commercial law and through nonlegal norms."

The second panel, "Corporate Accountability for International Labor Conditions," was led by Human Rights First Executive Director Michael Posner. Posner examined the global state of corporate accountability, urging the importance of "public pressure and public criticism...that comes with reporting and litigation in the courts." He also suggested creating "private enforcement initiative[s] that compa-

nies feel obligated to abide by." Jennifer M. Green, from the Center for Constitutional Rights, followed with an examination of recent U.S. litigation in corporate accountability for actions overseas under the Alien Tort Claims Act. Finally, Terry Collingsworth from the International Labor Rights Fund described his experiences litigating to protect international labor rights in U.S. courts and obstacles that continue to thwart corporate accountability.

Alice Tepper-Marlin, president of Social Accountability International and an adjunct professor at NYU's Stern School of Business, spoke in the final panel, "The Formulation and Implementation of Corporate Codes of Conduct." She discussed her organization, which works with "key stakeholders" in order to formulate, implement, and ensure compliance with voluntary standards of conduct. Scott Greathead, CEO of World Monitors Incorporated, commented on the unique difficulties that oil and mining corporations face, as well as the current sad state of corporate codes of conduct in manufacturing. Rae Lindsay, a partner at Clifford Chance, LLP, took on the difficulties faced by corporations doing business overseas as they make efforts to comply with human rights laws even as attempts are increasingly made to hold them accountable for human rights violations perpetrated by third parties. Her conclusion: Changes must be made on the international scale to better guide corporations in this noble—and essential—pursuit. ■



Michael Posner, executive director of Human Rights First, Jennifer Green, staff attorney at the Center for Constitutional Rights, Terry Collingsworth, executive director of the International Labor Rights Fund, and Kathy Zeisel ('05), chairperson of Law Students for Human Rights.



Tal Becker of the Israeli mission to the United Nations

Mid-East Dilemmas

Should an ambulance be stopped at a roadblock and searched for bombs? Would your answer change if you knew that a suicide bomber with explosives strapped to his body was inside? Such issues were addressed at the Conference on International Law and the Middle East Conflict held this spring at the Law School. The conference was co-hosted by the NYU Jewish Law Students Association, in conjunction with the Anti-Defamation League and the NYU Bronfman Center for Jewish Student Life.

Tal Becker, legal adviser to the Israeli mission to the United Nations, gave the keynote address. A veteran of the Israeli army, Becker is an expert in international law and has represented Israel in peace negotiations with the Palestinian Authority and at the International Court of Justice. He defended Israel's practice of targeted assassination as a legitimate method of self-defense, noting that the European Union was wrong to simultaneously recognize Israel's right to self-defense yet deny it the means to pursue that right. Too many governments fail to recognize that Israel is engaged not in a criminal investigation of Hamas, but an open armed conflict. In armed conflicts, he said, the laws of war apply.

The conference also included a panel discussion with several scholars and practitioners in the areas of human rights and the Middle East conflict. The panelists included Jonathan D. Tepperman, a senior editor at *Foreign Affairs*; Ruti G. Teitel, Ernst C. Stiefel Professor of Comparative Law at New York Law School; and Roy Schöndorf, a Law School J.S.D. candidate.

Ruth Wedgwood, the Edward B. Burling Professor of International Law and Diplomacy at Johns Hopkins University, discussed the legal context of the case over the Israeli security barrier at the International Court of Justice. Other breakout sessions covered topics such as Palestinian refugees, human rights, Israeli settlements, and the international legal response to global terrorism. ■

The Legacy of Korematsu

Why we need “rebellious” lawyers

Sixty years after the U.S. Supreme Court affirmed government internment of Japanese-Americans during World War II in *Korematsu v. United States*—and 21 years after it overturned that decision—courts are facing wartime civil liberties issues again. This time those under scrutiny aren’t Japanese, but Arab and Southeast Asian citizens and noncitizens. The Asian Pacific American Law Students Association’s spring symposium, “From Korematsu to Guantanamo Bay: Judicial and Presidential Authority in Times of Military Conflict” examined these political and ethical questions, focusing on post-September 11 immigration policies and the legality of indefinite military detentions.

In the first panel, Muzaffar Chishti, a senior policy analyst at the NYU School of Law’s Migration Policy Institute, and Jan Ting, a former INS official and Temple University Law School professor, argued about whether tougher enforcement of immigration laws would reduce terrorism or simply create more racism. In the second panel, Law School professors Michael Wishnic and Stephen Schulhofer and David Rivkin, a partner at Baker & Hostetler, analyzed the

José Padilla, Yaser Hamdi, and Guantanamo Bay cases, debating the military detainees’ status and due process rights.

The highlight of the symposium, however, was the third annual Korematsu Lecture, given by Bill Ong Hing, professor of



Bill Ong Hing

law and Asian American studies at the University of California, Davis. Hing was introduced by NYU School of Law’s Professor Gerald López as “the best immigration lawyer in the U.S.” and one who practices what

López calls “rebellious lawyering.” Rebellious lawyers, Hing went on to explain, work with, not just on behalf of, their clients. They hone their listening skills and powers of observation, showing respect for clients with little formal education and income. Hing, who founded the Immigrant Legal Resource Center in San Francisco in 1980 and served on the U.S. Department of Justice Citizens’ Advisory Panel, called for public interest lawyers to learn from clients about what it is like to be at the margins and the bottom of society.

He cited *Soko Bukai v. YWCA* as an example of the kind of work that inspires him. The case centered on the true ownership of a community building bought by the San Francisco YWCA in 1920 for a Japanese group then barred by state alien land laws from owning land. Three lawyers, Karen Kai, Don Tamaki, and Robert Rusky, argued for Soko Bukai, a consortium of three Japanese Christian churches. They achieved their goal not just by representing their clients, but also by motivating and mobilizing the community to support their cause. In the end, a settlement was reached and Soko Bukai was allowed to complete the purchase of the building at well below market cost.

The three lawyers were also part of a team that argued successfully to overturn *Korematsu v. United States* in 1983. The Korematsu Lecture series began in 2000. In order for the series to receive permanent funding, however, the APALSA must raise \$50,000 by next year; please contact Susan S. Shin (’06), an APALSA chair, at sss289@nyu.edu if you would like to support the Korematsu series. “So far, we have garnered \$17,000,” said Jeanette M. Park (’05), who organized this year’s lecture. “It’s really important for us to try and get pledges from current students so that they’ll continue to contribute once they start working.” ■

Challenges Remain 50 Years After *Brown*

Fifty years after *Brown v. Board of Education*, economists, professors, and sociologists gathered to discuss “The Black Middle Class: Barriers to, and the Consequences of, African-American Class Mobility,” a symposium sponsored last winter by BALSAs, the Black Allied Law Students Association. NYU School of Law Professor Deborah Malamud delivered the opening remarks, saying the recent decisions in the affirmative action cases *Gratz* and *Grutter* provided the impetus for the symposium. There are two issues to examine, she said. How do we increase the size of the black middle class, and how do we get the growing black middle class to fill the gaps that make them need affirmative action?

In the first panel, entitled “The Growth of, and Ongoing Challenges Facing, the Black Middle Class in the 50 Years Since *Brown*,” sociologist Amy Stuart Wells of Columbia University shared her research into integrated schools, concluding that graduates were “grateful for having attended these diverse schools.” She said white graduates talked a lot about increased comfort and decreased fears, while minority graduates talked about learning survival skills in a white world. But it wasn’t all good news.

Despite all these common experiences, when graduates looked at their lives today, they found themselves still living in segregated worlds.

Professor Rachel Godsil of Seton Hall Law School and professor and sociologist Karyn Lacy of Emory University were on the second panel, “The Landscape of Challenges Facing Middle-Class African-Americans.” They discussed the difficult balancing act of suburban, middle-class African-Americans trying to assimilate into a white world while maintaining black social ties and culture. Sandra Smith, who was at NYU at the time and is now a sociology professor at the University of California at Berkeley, elaborated on how these same tensions affect middle-class black college students: “Students feel a struggle within as they try to maintain strong racial commitments while enjoying the experiences afforded by mixing in the university?”

The Catch-22 of achieving in a white world can also leave black professionals feeling empty inside, concluded NYU School of Law Professor Derrick Bell. “They learn the hard way that success does not shield them from the myriad forms of racial subordination,” he said. “Too often their achievements as individuals come at a price, and sometimes a price not worth paying. As they climb the ladder of success, they leave their values on the rungs, and arrive well-heeled and moderately respected by nearly everyone—but themselves. The only antidote is to recognize it and try to do as much good through our positions as we can.” ■



Professors Derrick Bell of New York University School of Law and Amy Stuart Wells, a sociologist at Columbia University Teacher’s College.



Left to right: Professor Holly Maguigan, Professor of Clinical Law at NYU School of Law; Mark Eckenwiler of the Department of Justice; Professor Ric Simmons of Moritz College of Law, Ohio State University.

Justice in a High-Tech World

Technology advances play a bigger role in today's courtrooms and cases

What role should technological advancements such as DNA and fingerprint testing play in the courtroom? What is the relationship between the Fourth Amendment and new technology? These and other issues were the topics of a symposium examining “The Power and Pitfalls of Technology: Evidence Law and the Modern Courtroom,” presented by the *Annual Survey of American Law*.

“Technology and Truth: Using Technology to Establish Justice,” addressed questions relating to DNA testing and how it changes traditional courtroom procedure. Barry Scheck, professor of law and director of clinical legal education at the Benjamin N. Cardozo School of Law at Yeshiva University and co-founder of the Innocence Project, called for the expansion of the use of technology as new proof of innocence. Scheck proposed that “this doctrine should not be limited to DNA testing” and “should include instances where the individual has pled guilty.”



Scheck examined solutions, including the use of “John Doe warrants,” to avoid statutes of limitation for cases involving biological evidence and “forensic audits,” using the services of independent groups to examine forensic practices.

Meanwhile, “Technology-Enhanced Surveillance:

Orwellian Intrusion or Legitimate Investigation?” examined the relationship between new technology and Fourth Amendment protections and “2050: A Courtroom Odyssey” assessed the role of technology in the courtroom. While excited about the evolving science, panelist Gordon Bermant, a psychologist and lawyer, warned there was a danger in relying too heavily on these new processes. “To the extent that technology fades into the background and allows us to focus on what brought us here—it’s a good thing,” he said. “But to the extent that it focuses attention on itself and is promoted as the endgame, it’s a bad thing.” ■

Internet v. Intellectual Property Rights

As a law student almost 50 years ago, Pauline Newman (’58) used to take tea in Greenberg Lounge. This spring, Newman—now Judge Newman of the United States Court of Appeals for the Federal Circuit—returned there to talk about intellectual property and the legal future of the Internet.

“Intellectual property takes the legal form of patents, trademarks, copyrights, trade secrets, and proprietary business information,” she said in a speech sponsored by the Intellectual Property and Entertainment Law Society. “These laws are being prodded and stretched by the nature and capabilities of cyberspace.”

The judge, who earned a Ph.D. in chemistry before attending the Law School, sympathized with those who believed that the very unruliness of the early Internet had accelerated science and creative art. But, she added, “The sweet freedom of the early days of the Internet will never return.” While she expressed dismay at “intrusions of government into science,” Newman, a former director of patents and licensing at FMC Corporation in Philadelphia, reminded the audience that with tools as powerful as the Internet, legal oversight “is inevitable.”

“Each new technologic capability of the Internet raises new possibilities of fraud, or sharp practice, or exploitation, or conflict,” the judge said. “Old laws are being tested; new laws are being enacted.”

While Internet communication raises new questions for the courts, especially of venue and extraterritorial police power, they and legislatures are right to build upon pre-Internet wisdom in reaching a new balance, she said. Judge Newman suggested that it was far better to be cautious, and let social change outpace legal change, than to overreact. “The great strength of the law,” she said, “is that it lives in the past.”

But lawyers must live in the present—and find new ways to cope with the legal ramifications of new technology. And those who do, the judge noted, are sure to have an “interesting and promising future.” ■



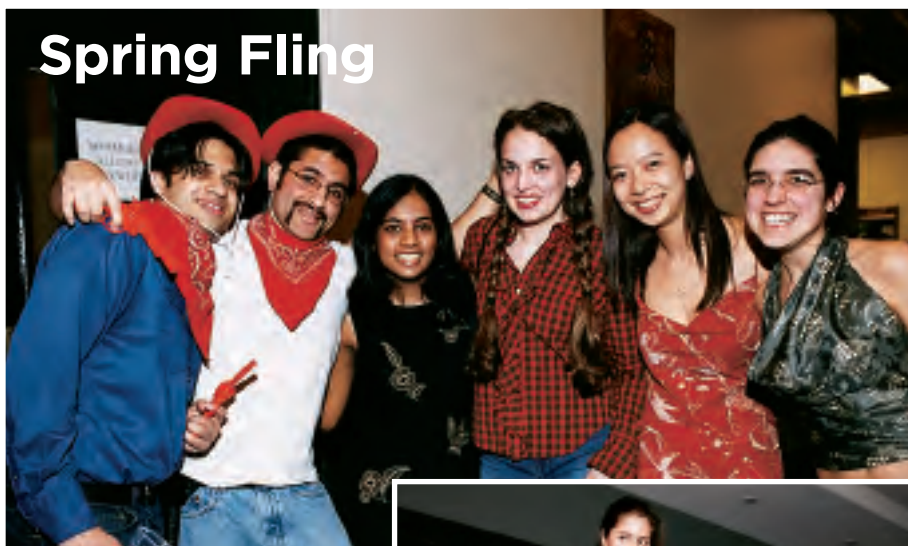
“The sweet freedom of the early days of the Internet will never return,” says Judge Pauline Newman (’58).

Law Students Letting Off Steam

Fall Ball



Spring Fling



Around the Law School



Telling Talks, Engaging Lectures, and Provocative Programs

Rita Hauser Awarded the Prestigious Vanderbilt Medal

Distinguished faculty, trustees, guests, administrators, and current and former Hauser Scholars convened to honor Rita Hauser ('59) with the Arthur T. Vanderbilt Medal, the highest honor that NYU School of Law awards its alumni.

In past years, the award has gone to such notable figures as Judge Edward Weinfeld ('21), Senator Jacob Javits ('26),

Martin Lipton ('55), and Judge Judith Kaye ('62). Last year, the award went to Judge Rose Luttan Rubin ('42).

"Rita is a wonderful woman who has done a lot for the Law School," said University Trustee Herbert Paul (LL.M. '61). "She's very deserving."

Hauser has focused much of her career on public service, serving as a human rights ambassador to the United Nations and spe-

cializing in international legal matters at the New York law firm Strook & Strook & Lavan, where she practiced as a senior partner and is now of counsel. In 2001, Hauser was appointed by President Bush to



Rita Hauser ('59)

the Intelligence Oversight Board, a standing committee of the president's Foreign Intelligence Advisory Board.

Interested in world peace, security, and human rights, Hauser also presides over the philanthropic Hauser Foundation. She also has served on commissions affiliated with the U.S. Department of State, the Brookings Institution, and the International Center for Peace in the Middle East. Her efforts for peace in the Middle East earned her the

the traditional study of the formal, international system of laws to include global issues such as climate change, Internet issues, terrorism, humanitarian intervention, and Holocaust reparations—an effort that has helped to make NYU the world leader in international legal education.

“Rita doesn’t hold a showy office, but she’s a woman of enormous influence nationally and internationally,” said attendee David Malone, president of the Interna-

“Rita doesn’t hold a showy office, but she’s a woman of enormous influence nationally and internationally. She’s in huge demand worldwide.” —DAVID MALONE

Shimon Peres Peace Award from Americans for Peace Now. She is a director of many organizations, including the International Institute for Strategic Studies in London, the RAND Corporation, and the Lincoln Center for the Performing Arts.

But she is best known at the Law School as the co-namesake of the Hauser Global Law School Program, with her husband Gustave Hauser (LL.M. ’57), chairman and CEO of Hauser Communications. The Hauser program, established in 1994, is the centerpiece of the Law School’s international enterprise, attracting the finest international law scholars, promoting scholarship on comparative and global law, and planning events through the Law School’s centers and institutes as well as with academic institutions worldwide. In an increasingly interdependent world, the Program ventures beyond

tional Peace Academy, a nonprofit research institute for international security issues located in New York City, of which Hauser is the chair of the board. “She’s in huge demand worldwide.”

The Hauser Scholars, a group of the 11 most impressive students with law degrees from around the world, complete a competitive application process in order to be selected to receive full scholarships to attend the Law School. Dean Richard Revesz introduced the attendees to one such scholar, Marieke Wierda (LL.M. ’97), now a senior associate at the International Center for Transitional Justice, a nongovernmental organization based in New York, who took the podium to thank Hauser.

“Your scholarship gave me opportunities that I otherwise never would have had, concrete opportunities to pursue rewarding

tasks,” Wierda said. “It also gave me immeasurable personal benefits and close friendships. I want to thank you personally.”

Revesz then listed a number of Hauser’s philanthropic accomplishments, focusing on the events surrounding the creation of the Hauser Program. “I think that when the history of 20th century legal education is written, it will say that one of the most important things that happened is the Hauser Global Law School Program.”

“I dodged this award for a couple of years, but they finally wrestled me to the ground,” said Hauser. “Gus and I got together with John Sexton 10 years ago and decided it was time to take a great law school and make it a part of the global environment.”

Hauser spoke glowingly of the success of the students who have been selected for the Hauser program. “All of them give me the greatest sense of pride and joy.” ■

Humanitarian Intervention

Ashdown on justice

When should the international community intervene in places where human rights are being violated? And once wrongs have begun to be righted, when should forces withdraw? These were some of the difficult issues addressed by Lord Paddy Ashdown, High Representative for Bosnia and Herzegovina, last spring in the eighth Hauser Lecture on International Humanitarian Law, sponsored by NYU’s Hauser Global Law School Program and the International Committee of the Red Cross. The series honors Gustave Hauser (LL.M. ’57), a renowned lawyer and innovator in the cable television industry, and Rita Hauser (’59), a highly regarded public service lawyer, president of the philanthropic Hauser Foundation, and chair of the International Peace Academy.

In his speech, entitled “International Humanitarian Law, Justice, and Reconciliation in a Changing World,” Lord Ashdown argued that humanitarian law offers a legal basis for intervening in states that commit gross violations of international law or fundamental human rights. It also provides practical means of quelling intrastate conflicts that devastate the lives of ordinary people—a point that the late Judge Richard May, who presided in the trial of Slobodan Milosevic for the U.N. International Criminal Tribunal for the former Yugoslavia (ICTY), made in last year’s Hauser Lecture. Lord Ashdown rejected the traditional argu-



Esteemed lawyer and philanthropist Rita Hauser (’59), in front row, second from left, with husband Gustave (LL.M. ’57), the dean, and a group of Hauser Scholars. She received the Arthur T. Vanderbilt Award.

ment that since the international community cannot intervene everywhere it should not intervene anywhere. He also dismissed the notion that humanitarian intervention is nothing but soft-headed altruism. "We cannot afford to ignore failed states," he said. "What lies in them can pose a threat to our own well-being."



Lord Paddy Ashdown says ignoring failed states poses threats to everyone's well-being.

The session was a testament to the Law School's international ties and deep connection to the efforts made to solve the problems in the former Yugoslavia. Professor Theodor Meron, Charles L. Denison Professor of Law who is on leave from the Law School because he is currently serving as the ICTY's president, introduced Lord Ashdown, and once he had dispensed with his formal duties, went on to contribute to a rich exchange following the lecture. During the question and answer session, relevant issues were raised by other eminent members of both the international human rights community and the Law School faculty who were in the audience such as Richard Goldstone, who was a chief prosecutor at the criminal tribunals for the former Yugoslavia and Rwanda and a former justice of South Africa's Constitutional Court. Goldstone has longstanding ties to the NYU School of Law—having spent time teaching as a distinguished global fellow and as a global visiting professor of law. Antonio Cassese, another colleague who was in attendance at the Ashdown talk, also served as president of the ICTY and has been a distinguished global fellow too. The intensity of the discussion was palpable, reported the students who attended. ■

The Brennan Lecture

Marshall says to look abroad for precedents

Chief Justice Margaret Marshall of the Supreme Judicial Court of Massachusetts drew a huge crowd this winter when she delivered the 10th annual Justice William J. Brennan Jr. Lecture on State Courts and Social Justice. Sponsored by the Institute of Judicial Administration and the Brennan Center for Justice, the series honors Brennan's abiding vision of the responsibility of state courts to protect constitutional rights with lectures that focus on and highlight the role of the state judiciary.

A week before her speech, Marshall presided over a controversial decision about gay marriage. Her court declared the Massachusetts legislature's civil unions bill unconstitutional on the basis that it did not allow for gay marriage. Though Marshall, the first woman to serve as chief justice on the Supreme Judicial Court of Massachusetts in its more than 300-year history, did not directly comment on her decision, the issue did seem to be reflected in how she defined judicial independence. She called it "a system of government in which judges have the power to say no: no to legislators, no to governors, no even to presidents when the needs of the political moment clash with constitutional guarantees."

Chief Justice Marshall's speech, "Wise Parents Do Not Hesitate to Learn from Their

Children: Interpreting State Constitutions in the Age of Global Jurisprudence," urged the U.S. courts to consider decisions from appropriate foreign courts when dealing with situations uncommon to American jurisprudence. Marshall observed that in *Lawrence v. Texas*, a case about a gay man's right to have sex in the privacy of his own home, the Supreme Court cited a case decided by the European Court of Human Rights that held that "the protected right of homosexual adults to engage in intimate, consensual conduct" is "an integral part of human freedom."

She explained that American courts may find persuasive authority in the reasoning and conclusions of the high courts of constitutional democracies where written guarantees of individual rights are protected by an independent judiciary. Justice Marshall presented three contexts in which state courts might benefit from consideration of analogous decisions from abroad: personal autonomy, regulation of hate speech, and physical detention. "The question today is not whether state court judges should consider the work of foreign constitutional courts when we interpret our state's constitution. The question is whether we can afford not to," said Marshall. "Our constitutional offspring have much to tell us. We would be wise to listen." ■



Chief Justice Margaret Marshall argues that federal judges need to say "no to legislators, no to governors, no even to presidents when the needs of the political moment clash with constitutional guarantees."

A Journey from Struggle to Influence

Building the Inter-American Court of Human Rights

It wasn't easy to establish the Inter-American Court of Human Rights. In fact, the court, now considered one of the preeminent human-rights institutions in the Americas, was sidelined for the first seven years of its existence, hearing few cases.

"The IACHR was established [in 1979] in the middle of massive human-rights violations... the Cold War allowed military dictators and civilian regimes to engage in torture and other massive abuses," Judge Thomas Buergenthal ('60), one of the court's founders and its former president, told his listeners in a spring lecture sponsored by the Institute for International Law and Justice and the Center for Human Rights and Global Justice. Regimes in Central and South America were openly hostile to or dismissive of the court's role and purpose, he said.

Judge Buergenthal described the intense struggle to establish the IACHR.

The judge, an American who was nominated to the court by Costa Rica, said Costa Rica's early and vigorous support was the only lifeline the court had. Judge Buergenthal recalled that the venue where sessions

were initially held was far from formal—the first meetings were in the bathhouse of the Costa Rican Bar Association. The deliberating judges could hear children playing in the outside pool.



Judge Thomas Buergenthal ('60), a founder of the IACHR, describes the first meetings of the court, which were held in a Costa Rican Bar Association bathhouse.

Over the next two decades, the court slowly built legal and moral legitimacy and the Inter-American Commission on Human Rights began to recommend more cases be heard by it. The court raised its profile in the

mid-80s, when it considered hundreds of cases involving Hondurans who were allegedly murdered by government death squads. (The court ruled against the government of Honduras.) Beginning in 2001, the

Inter-American Commission on Human Rights was required to send all cases to the court, thereby increasing its influence. Last year, for example, the court set a financial precedent with its decision against Guatemala in the death-squad murder case of anthropologist Myrna Mack Chang, ordering Guatemala to pay the Mack family more than \$600,000 for damages, and pain and suffering.

Though Judge Buergenthal left the IACHR in 1991, he continues to fight for human rights on a global scale. He is now serving as one of 15 judges of the International Court of Justice, the principal judicial body of the United Nations. Among his colleagues on the bench are three with NYU ties: Judge Gonzalo Parra Aranguren (M.C.J. '52),

Judge Nabil Elaraby (LL.M. '69), and Judge Hisashi Owada, who from 1995 to 1999 was the Inge Rennert Distinguished Visiting Professor of International Law at the Hauser Global Law School Program. ■

Global Public Service Law Project Conducts Regional Institute in Budapest

July 2004 marked a breakthrough for the NYU School of Law's Global Public Service Law Project. After years of bringing activist and government lawyers from the developing and transitional world to New York City, the project's faculty and staff traveled to Central Europe to take the program directly to lawyers in the field.

The project offered its first Regional Institute in Budapest, Hungary, in conjunction with Central European University last July. Twenty-one lawyers from countries as diverse as China, Azerbaijan, Ethiopia, India, and Russia participated in the three-week program, which dealt with the emerging global phenomenon of public interest law, with a special focus on the forms it has taken in Central and Eastern Europe.

The Regional Institutes Program has built upon the experience and resources gathered over the past six years of the Global Public Service Scholars program. Since 1999, as many as 59 activist and government lawyers from the "global South," or developing nations, have come to the Law School to complete the LL.M. in Public Service Law and to engage in a yearlong conversation about legal strategies for social change that succeed in different national settings.

The potential impact of the Regional Institutes Program is high. By going beyond the walls of NYU, the Institutes will reach lawyers in developing countries who are hungry to be part of a conversation among global activists, but are not able to spend a year at the Law School. Project faculty hope the Institutes will

create lasting professional relationships among public service lawyers in developing nations.

To make the institute model a success, faculty and staff designed a curriculum to introduce the participants to a range of public interest strategies and to stimulate a conversation about how best to pursue social justice through law. The Program also included field visits to leading public interest organizations in Budapest, such as the European Roma Rights Center and the International Center for Not-for-Profit Law.

The Budapest Institute's seven-person faculty consisted of practicing lawyers and legal academics from five countries: the United States, Slovakia, Hungary, Romania, and the Philippines. Particularly exciting was the teaching role played by Arnold De Vera, a 2002 alumnus of the LL.M. in Public Service Law who litigates and organizes on behalf of Filipino laborers at SALIGAN, a prominent public interest organization in Manila.

According to Professor Frank Upham, now the Wilf Family Professor of Property Law and the co-director of the Global Public Service Law Project, "Arnold's involvement was one of the best things about the Budapest program. We hope that future Institutes will not only allow us to reach more lawyers in the South, but also to integrate our alumni fully into our work at NYU and in the field."

The curriculum and teaching staff are not the only ways in which the Regional Institute broke new ground. It also utilized a new funding model, bringing together support from governmental, nongovernmental, and academic donors: the Open Society Institute supported three participants from Palestine; the Ford Foundation and the U.S. Department of State supported five Chinese participants; and the Global Public Service Law Project and Central European University jointly supported the general program. The Institute also represents a strengthening of NYU's ongoing relationship with CEU, which is home to global law faculty members András Sajó and János Kis.

The Project hopes to conduct regional institutes in different locations over the next two to three years. Cities currently under consideration include Beirut, Manila, Beijing, and Bangalore. ■



Clockwise from top: Global Public Institute student Sathya Narayan, Joint Director of the Institute of Advanced Legal Studies at ILS Law College, University of Pune, India, with Mehari Taddele Maru from Ethiopia; Ibrahim A.B. Abu Shamalah from Palestine; Arnold De Vera (LL.M. '02) from the Philippines, teaching as part of the Law School's Global Public Service Institute.

One Barefoot Lawyer's Quest for Legal Justice in China

When Guangcheng was not a likely hero. Living in a small village in the Chinese countryside, the 31-year-old blind man earned his livelihood as a massage therapist only to learn that he was being unfairly taxed by his local government. Despite such barriers as an intractable government and a nearly inaccessible county seat, Chen did what few others dared: He taught himself the law, took on the local government, and crusaded for the rights of Chinese citizens with disabilities.

In a recent lecture, NYU School of Law Professor Jerome Cohen gave a telling account of his experience with Chen, whom he called a "barefoot lawyer" in rural China. The disabled in China are supposed to be exempt from paying taxes according to central government rule, but many local governments violate the law. Chen initially got involved in the legal system simply to exempt himself from the illegal tax, and he says he still only seeks to enforce the will of the central government; in the meantime, he has become an advocate for all Chinese citizens with disabilities, and has

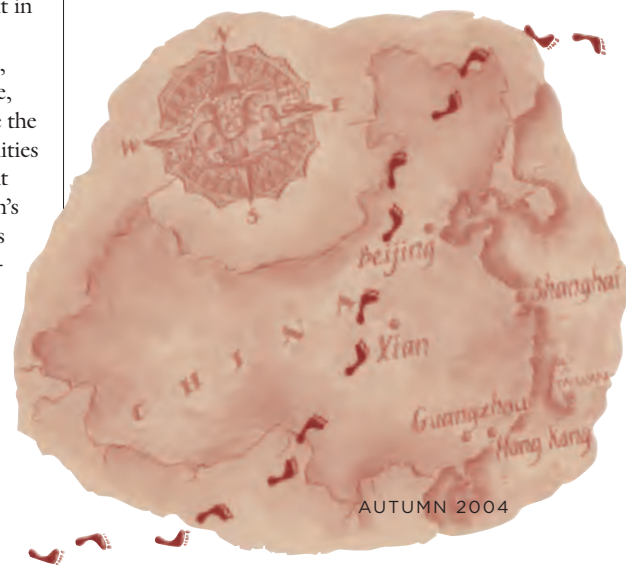
occasionally won cases for disabled villagers in the lower court of his country.

Cohen, an expert on Chinese law, was introduced to Chen in New York through a U.S. State Department program. They next saw each other in Beijing where Cohen accepted an invitation to visit Chen's rural Shandong Province and experience first-hand the social, economic, and political context in which this self-taught attorney operated.

Last October while teaching in China, Cohen was able to travel to Chen's village, one of 61 tied to a single township where the lowest court, local lawyers, and legal facilities are located. Distance from the county seat precludes many disabled villagers in Chen's township from seeking legal assistance, as does the high cost of transportation. Further complicating the issue, the courts sometimes will not hear cases because it is not profitable for them to do so. The local lawyers are unwilling to help not only because there is no money in such cases, but also because they don't want

to offend the county's governing elite by questioning the application of laws.

These problems make the amateur lawyer's job far more difficult. Having taken only one law course during his college-level training for the blind in massage therapy, Chen nevertheless sought out books and other materials to educate himself in law. The majority of his work is dedicated to fighting discrimination in the collection of taxes against the disabled and seeking to ensure that legislation adopted by the central government is applied properly at the grassroots level.



Waiting on China

By Jerome A. Cohen

Jerome A. Cohen is a law professor at New York University and adjunct senior fellow at the Council on Foreign Relations.

The long-pending case of Yang Jianli, a Boston-based democracy activist who was detained by China's security police two years ago today, offers a vivid example of Chinese-style political-legal gridlock.

Although China has no jury system, in politically sensitive cases it often has the functional equivalent of a "hung jury," decision-makers who cannot agree on a verdict despite long deliberation. In such cases, the decision-makers are not the judges nominally responsible for deciding important cases. Rather, they are unidentified Communist Party officials—frequently at the highest level. When those leaders disagree on the outcome of a controversial case, the hapless accused is simply forced to wait. The time constraints imposed by the country's criminal procedure code are swept aside amid endless debates over charges, evidence, punishment, and politics, domestic and international.

Such is the case of Yang, a Chinese national with U.S. permanent residence and doctorates from Harvard and the University of California at Berkeley, who was denied the right to return to his homeland after the 1989 Tiananmen tragedy. After detention, he was investigated for entering China by using a friend's passport and was held in solitary confinement for almost a year, incommunicado, with no notice of his whereabouts given to his family and no access to counsel.

As the generous legal time limit for criminal investigation was about to expire and his detention was to exceed China's maximum one-year punishment for those convicted of illegal entry, the authorities started the detention clock over again by launching a new investigation, this time for alleged acts of spying for Taiwan, a much more serious charge that could lead to the death penalty.

Yang's family, members of Congress, the State Department, the United Nations, human rights organizations, the media and his lawyers all subjected the Chinese government to unremitting pressure in an effort to extract him from the clutches of the security police. Not only did the U.N. Working Group on Arbitrary Detention find Yang's detention to be in violation of international law, both houses of Congress unanimously adopted resolutions calling for his release.

Yang was indicted on both the illegal-entry and spying charges and tried on Aug. 4, 2003, in Beijing's No. 2 Intermediate People's Court, the main arena for political trials. Because "state secrets" were allegedly involved, the hearing was closed to the public, excluding even his family and representatives of the U.S. Embassy. After a half-day hearing, the three-judge panel announced that a decision would be issued in due course, and Yang was returned to his cell.

Since China's criminal procedure code normally requires a trial court to issue its judgment within a month and a half of receiving the indictment, the end of Yang's wait seemed in sight. Yet no decision was forthcoming.

The court extended its deadline a month, as allowed for difficult cases. When that proved insufficient, the court, seeking a fig leaf for the delay, asked Yang's lawyer last October to apply for another month's extension on the spurious ground that the defense needed to collect additional evidence. In the repressive Chinese context, where embattled defense counsel appear before this important court regularly, this was an offer that was hard to refuse. Yet Yang's counsel, the well-known human rights lawyer Mo Shaoping, refused to collaborate in his client's continued incarceration.

Staffers at the prosecutor's office that supervises Yang's detention center subsequently admitted that on Dec. 1, Yang's detention had officially expired and those responsible for holding him illegally should be punished. But they also conceded that this is no ordinary case.

The Chinese government claims that last year, its strict new procedures for ending illegally prolonged detentions corrected more than 25,000 violations. Yet Mo's petitions to the Supreme Prosecutor's Office and the Supreme Court seeking Yang's release have gone unanswered, as has his family's petition to the National People's Congress.

Yang's two years of punishment without any conviction is a severe deprivation for him and his American wife and children. But it is also a blatant acknowledgment by the Chinese government that its belated campaign to end the scourge of overtime criminal detentions, which the National People's Congress has characterized as "a chronic disease," has a long way to go. Despite China's commendable efforts to create a legal system, politics is still in command.

Originally published in *The Washington Post*, April 26, 2004.

Cohen, impressed by Chen's determination, decided to help fund a small law library for him. Cohen's research assistant, Eddie Hsu (04), who accompanied him to China, went to a bookstore in Beijing and purchased texts about everything from tax to administrative law in order to help Chen in his search for justice. During his stay in the village, Cohen was able to see that this investment would reap high returns, as Chen and his farmer brother used their newly acquired knowledge of civil procedure and administrative law to challenge the denial of a hearing by the local court on a tax discrimination case.

Despite his occasional success, Chen still faces many problems. Though he has won some cases in the lower court, a few were rejected. He has not yet won an appeal in the distant city intermediate court, where these



Professor Jerome Cohen helped fund a law library for a Chinese citizen fighting unfair government policies in China.

claims tend to be compromised as a result of local political and economic pressures. Some of China's professional lawyers feel that Chen and similar activists are tarnishing the reputation of the legal profession by practicing without a certified legal education. They choose to ignore the failure of the legal profession to meet the needs of China's poor and disabled rural people, Cohen said.

Chen's work extends beyond the legal sphere. His primary concern is simply to make life better for citizens in his township and for the disabled. Perhaps the most telling example of this occurred when villagers realized their inconveniently located water supply was becoming polluted, and turned to him. Chen traveled to Beijing where he requested assistance from the British Embassy, which referred him to a British charitable foundation. It donated £25,000 for a new well, and residents of Chen's village can now drink safely and conveniently. As Cohen said, "Instances such as these have made Chen a hero in his village of 480 people." ■

Taiwan's Transformation of Its Criminal Justice System

Gelatt lecture addresses sweeping changes



Daniel Ping Yu, Research Fellow in Chinese Law at the NYU School of Law, with H.F. Huang, a Taiwanese High Court judge, and J.P. Wang of the National Taiwan University College of Law.

The lessons learned from the recent upheaval of the Taiwanese criminal justice system were the focus of the ninth annual Timothy A. Gelatt Dialogue on Law and Development in Asia. Hosted by the Law School, the dialogue was entitled “Criminal Justice and Chinese Political-Legal Culture: Recent Hope from Taiwan?”

Since 1997, in conjunction with the island's recent democratization, Taiwan's criminal justice system has undergone a

transformation as hundreds of provisions of the Code of Criminal Procedure (CCP) have been amended, implementing a move from an inquisitorial system to an adversarial system that went into high gear in 2002. One of the leading architects of these changes, Professor J.P. Wang of the National Taiwan University College of Law, said the shifts included the adoption of American-style rules of evidence; the termination of prosecutors' rights to issue detention orders of

suspects and search warrants; and the increased rights of defendants and their counsel, such as the right to confront witnesses, the right to remain silent and the right to cross-examine witnesses.

Wang was joined by several luminaries of East Asian legal studies. NYU School of Law Professor Jerome Cohen, one of the leading international experts in East Asian law, moderated the panel, which included Law School professors Holly Maguigan and Frank Upham; Daniel Yu, a Law School research fellow; Jonathan Hecht, deputy director of the China Law Center at Yale Law School; and H.F. Huang, a Taiwanese High Court judge.

Wang and Cohen agreed that Taiwan's move toward democracy and an independent media have been crucial for judicial reforms. Wang said that intense public and media scrutiny—as well as increased pay—have virtually wiped out corruption from the Taiwanese judiciary. Prosecutors and judges are now given good apartments by the state, along with pay that exceeds that of professors or mayors. In addition, the public and media will turn their full attention to even “the whiff of corruption charges,” he said.

Wang emphasized that a series of unique events since 1997 had helped prompt change. For instance, in a celebrated bank robbery case, the police announced they had a confession from a suspect who reportedly had been tortured and not allowed the benefit of counsel. After the suspect committed suicide by jumping off a bridge, the real perpetrator of the crime was found. The resulting public outrage led to the adoption of a right-to-counsel rule. ■

Europe's Economic Power

European Commission President Romano Prodi talks about growing interdependence

Audience members may have had to strain to hear soft-spoken Romano Prodi, but the European Commission president's message heralding the European Union's growing global economic force was loud and clear.

Prodi, who spoke to about 300 students and faculty at the NYU School of Law's Vanderbilt Hall in November 2003, discussed both the push for enlargement of the E.U. into central and eastern Europe and a successful E.U. constitutional convention.

The European statesman, noting the union's expansion from 15 to 25 member states early in 2004, said the additional inclu-

sion of Bulgaria and Romania in 2007 would bring 500 million people into the Union.

“It will be the biggest economic unit in the world, in terms of income and in terms of trade,” said Prodi, who expressed hope that the Balkan states, Turkey, and former Soviet Union republics will possess the economic and political stability, and dedication to democracy and human rights to join the union at a later time.

Those values, he said, are central to the E.U.'s very existence: “The definition of Europe is a union of minorities, because there is no majority. Europe is a union of people and of nations, not like the United

States, and will always be a union of nations.”

Prodi also discussed the difficulties in drafting the E.U. constitution, finished in July 2003 and now under review, following almost two decades of attempts at constitutional reform. He cautioned that many difficult issues have yet to be resolved, including standards for the amendment process and the new constitution's call for a uniform E.U. foreign policy.

After his speech, Prodi took questions, including one on the future of Europe's relationship with the United States. Acknowledging there had been important differences between them on Kyoto, the International Criminal Court, and Iraq, Prodi affirmed that the two world powers share the same basic values.

Prodi, who was a professor of industrial policy at the University of Bologna for 18 years, served as Italy's prime minister from mid-1996 until November 1998. He was seen



"Thanks to his stewardship, [the E.U. has been able to] draft a constitutional treaty for Europe," said Professor Joseph Weiler, chair of the Hauser Global Law School Program, of Romano Prodi (above).

as instrumental in getting his country's finances in order to join the countries implementing the euro, Europe's single currency.

In 1999, he was appointed to the presidency of the Commission, the E.U.'s executive body. "Thanks to his stewardship, [the E.U. has been able to] draft a constitutional treaty for Europe," said Professor Joseph Weiler,

chair of the Hauser Global Law School Program and European Union Jean Monnet Chaired Professor, praising Prodi's moves on internal E.U. reform, open governance, and transparency. "Prodi's great statesmanship has been [to assert that] enlargement is going to go on with or without constitutional change." ■

Anthony Kennedy, Supreme Court Justice on the Global Village

He and fellow judges recognizing human rights

More than 40 distinguished jurists from across the nation gathered for two days last fall to participate in the Program on International Law for Federal Judges, hosted by the Institute of Judicial Administration (IJA) at the NYU School of Law and co-sponsored by the Federal Judicial Center and the Law School's Institute for International Law and Justice. Supreme Court Justice Anthony Kennedy was passionate about the role of the law in bridging physical and cultural distances. "Today," he said at the conference, "our challenge is to define our duty to recognize human rights."

Justice Kennedy, a key figure in bringing the conference together, took several days out of his busy schedule to spend time at the Law School, meeting with Dean Richard Revesz, faculty, and students as well as attending constitutional law classes. Kennedy, who is known for his particular interest in cross-border legal issues, also participated in a panel discussion on the role of international law in legal decision-making. Kennedy reminded the partici-

pants that our understanding of international law has come a long way from the early days of the republic, when "the law of nations" governed the slave trade and piracy. He noted that we have moved far from World War II and the battle of "the totalitarian state versus the free democratic state."

The Program included a series of panel discussions about post-September 11 immigrant detention, enemy combatant classification, and the use of military tribunals, as well as issues related to the prosecution of human rights violations by multinational corporations and foreign governments. Judges and professors discussed and debated a wide variety of topics, from whether international customary law should be a persuasive authority in federal court to

whether individuals should be able to sue foreign nationals in U.S. courts for sponsorship of terrorism abroad.

According to John Cooke, director of the education division of the Federal Judicial Center, there is an international dimension even to mundane cases such as torts and contracts these days. Just as international cash flow is increasingly uninhibited across borders, so are the movements of people. It is now common for matrimonial and child custody cases to involve family members who are scattered across nations with entirely different approaches to family law. One country may tend to favor child custody for the mother, in another the final say may lie with the father. In such cases, to what extent can the legal authorities of one country influence those of another?

"In cases of litigation, the parties must often cross international boundaries with different legal systems in order to gather information. The question is how to create a synthesis between these disparate systems," said Cooke. The intention of the conference was not to tell judges what to do when making these decisions, but to "expose them to the issues and allow them to talk about approaches to issues that they will see in their courtrooms."

For his part, Kennedy lamented that too many people around the globe live without electricity and running water, getting by on less than \$2 a day. "These are the new voices," said Kennedy. "How are we going to answer those voices?" Living in an international age calls for living up to its demands. "We have to figure out how to recognize the voices of all of humankind," said Kennedy. "This is our mission." ■



"We've come a long way from the World War II era of the totalitarian state versus the democratic state," says Justice Kennedy.

Do International Human Rights Treaties Make a Difference?

The obstacles to enforcing human rights



Professor Holly Maguigan, GPSLP faculty co-director, and Kenneth Roth, executive director for Human Rights Watch, with GPSLP scholars, Patrick Kiage (LL.M. '04), Helena Romanach (LL.M. '04), Ibarra Gutierrez (LL.M. '04), and Romanita Iordache (LL.M. '04).

The United States is often criticized these days for the unwillingness of its politicians and judges to take international legal obligations seriously. Progressive courts in South Africa and India and Europe have made headlines in legal circles by looking to international human rights law as a basis for major decisions. However, despite this trend, a recent panel discussion hosted by NYU School of Law's Global Public Service Law Project (GPSLP) asserted that public interest lawyers on the ground need more than international human rights law on the books to bring about positive social change.

The panel brought together scholars from the Philippines, Romania, Kenya, and Brazil for discussion about the obstacles that lawyers face enforcing human rights. The panel was moderated by Law School Professor Holly Maguigan, GPSLP Faculty co-director, and introduced by Kenneth Roth, executive director of Human Rights Watch (HRW).

Roth has led HRW since 1993 and has overseen its development into one of the world's premier human rights organizations. He discussed the various ways in

which nations internalize international human rights agreements and the different approaches by which public interest lawyers practice law as a result. Roth argued that too often in the United States, litigation is seen as the only way to advocate for a cause. He said that other methods of advocacy are needed to succeed in a world that is often

“There is no reason why the enforcement of rights needs to be limited to the legal realm.” —KENNETH ROTH

more political than legal. “There is no reason why the enforcement of rights needs to be limited to the legal realm,” he said.

Roth commended the GPSLP as an example of how legal education can prepare lawyers to confront challenges to the international rule of law and to enforce human rights across domestic borders. The panelists also discussed the relevance of international legal frameworks to the practice of domestic human rights law, and told story

after story about the creative approaches needed to succeed in enforcing human rights in developing countries.

Helena Romanach (LL.M. '04) spoke about her work as a criminal defense attorney in São Paulo, Brazil. She said that it

is common for judges in Brazil to sentence burglars to prison terms far beyond what the law allows, and for police to kill hundreds of suspects each year without any public outcry. Another panelist, Patrick Kiage (LL.M. '04), reported that in his work as a capital defense attorney in Kenya, international human rights treaties are not of much use; Kenya's judges are insufficiently educated about international law and are unwilling to even consider enforcing international agreements.

Ibarra Gutierrez (LL.M. '04), a public interest lawyer and advocate in the Philippines, noted that the fact that his country is a signatory to virtually every human rights agreement on record matters very little when it comes to the enforcement of human rights law in domestic courts. He illustrated this point with a story about a judge who argued that torture should be legal in certain situations,

even though the Philippines has signed the Convention Against Torture.

Romanita Iordache (LL.M. '04) described her life as a lawyer and advocate for gay and lesbian rights in post-Cold War Romania. Iordache claimed that Romania signs every human rights treaty only to ignore them in practice. “We are very good

at sham compliance,” she laughed. Iordache entertained the gathering with a story about how she once faced a judge who was unaware of the existence of the International Convention on Civil and Political Rights. Fortunately for Iordache and her client, she had a copy of the convention in her bag for a class she was to teach later in the day. Iordache was able to show the judge Romania's signature on the convention and went on to win the case. ■

A New Democracy, Enshrined in Faith

By Noah Feldman

Noah Feldman, author of *After Jihad: America and the Struggle for Islamic Democracy*, is a law professor at New York University. He was a senior adviser for constitutional law to the Coalition Provisional Authority in Iraq.

In his admirable if overdue speech last week, President Bush acknowledged 60 years of American error and announced a new policy of encouraging democracy rather than dictatorship in the Muslim world. What Mr. Bush neglected to mention was that many Muslims, if freed to make their own democratic choices, will choose Islam over secularism. A case in point is the newly released draft of the Afghan constitution, which enshrines Islamic values even as it guarantees basic liberties.

The document raises a crucial question that goes well beyond Afghanistan to the Muslim world as a whole: Can a nation be founded on both Islam and democracy without compromising on human rights and equality?

If the answer is no, then democratization in places like Iraq and Afghanistan will be a pyrrhic victory—we will have gotten rid of the Taliban and Saddam Hussein without their former victims actually achieving real freedom. If, however, a synthesis of Islam and democracy can satisfy devout Muslims, while at the same time protecting individual liberties and the rights of women and non-Muslims, then Islamic democracy may be the best hope for improvement in the Muslim world.

Make no mistake: the Afghan constitution is pervasively Islamic. Its first three articles declare Afghanistan an Islamic Republic, make Islam the official religion, and announce that “no law can be contrary to the sacred religion of Islam and the values of this constitution.” The new Supreme Court, which is given the power to interpret the constitution, is to be composed of a mix of judges trained either in secular law or in Islamic jurisprudence.

The new flag features a prayer niche and pulpit, and is emblazoned with two Islamic credos: “There is no God but Allah and Muhammad is his Prophet” and “Allah Akbar” (“God is Great”). The government is charged with developing a unified school curriculum “based on the provisions of the sacred religion of Islam, national culture, and in accordance with academic principles.” The provision requiring the state to ensure the physical and psychological well-being of the family calls, in the same breath, for “elimination of traditions contrary to the principles of the sacred religion of Islam.”

And yet, the draft constitution is also thoroughly democratic, promising government “based on the people’s will and democracy” and guaranteeing citizens fundamental rights. One essential provision mandates that the state shall abide by the United Nations Charter, international treaties, all international conventions that Afghanistan has signed and the Universal Declaration of Human Rights. Because Afghanistan acceded in March to the Convention on the Elimination of All Forms of Discrimination Against Women—a treaty the United States Senate has never ratified—the draft constitution guarantees women far-ranging rights against discrimination. It also ensures that women will make up at least 16.5 percent of the membership of the upper legislative house (only 14 of 100 United States senators are women).

In addition, the provision that makes Islam the nation’s official religion also recognizes the right of non-Muslims “to perform their religious ceremonies within the limits of the provisions of law.” This carefully chosen language might arguably leave room to restrict proselytizing—as, for example, do similar laws in India and Israel—but it nonetheless guarantees individual expression as an inviolable right. (It’s worth noting that the right to change one’s religion is enshrined in the human rights declaration.)

Yes, if the draft is ratified by the grand assembly, or *loya jirga*, tensions in the constitutional structure will have to be resolved later by the Supreme Court. According to the draft, for instance, political par-

ties must not be organized around a program contrary to Islam or the constitution. That would exclude an antidemocratic Taliban party; but would it also exclude a party of secularists who wanted to remove Islam from the constitution? What about laws requiring women to dress modestly: unconstitutional as a violation of women’s rights, or constitutional as in accord with the teachings of Islam?

The draft constitution gives guidance on all these questions, but the answers might well come down to the makeup of the Supreme Court: one dominated by illiberal religious scholars might interpret the text one way, while one with a majority of judges trained in the secular tradition might see it very differently.

In its ambitions, attractions and dangers, the Afghan draft constitution can be seen as a metaphor for the wider prospects of Islamic democracy. Like the Afghan constitution, Islamic democracy has no chance if the West does not help create the economic prosperity and social stability for its success. After driving out the Taliban, the American-led coalition has done too little to bring Afghanistan under the control of a centralized government, nor has the United Nations presence in Kabul lessened the *de facto* control of the country by regional warlords.

Unless America and the United Nations do more to buttress the sovereignty of an elected Afghan government, the constitution will inevitably become more of a symbol than an actual charter of governance. Similarly, unless America keeps steady pressure on Muslim countries to democratize—rewarding meaningful elections and punishing human rights violations—little progress will be made.

The paradox, of course, is that if the people of Muslim countries do get a greater say in their own government, Islamic politics will likely prevail. Islamic parties speak the language of justice, the paramount political value to most Muslims. In some places—Turkey, Indonesia and Malaysia—secular forces in the society counterbalance the rising Islamic politics. But in the Arab dictatorships, where secularist politics are associated with autocracy and graft, increased freedom will undoubtedly lead, at least in the short run, to new gains for political Islam.

This leads some to say that we should not promote democracy in the Middle East lest we open the door to elections that might be, in the memorable words of a former assistant secretary of state, Edward Djerejian, “one man, one vote, one time.” But calls to preserve the undemocratic status quo fail to acknowledge that the alternative to trying Islamic democracy may be much worse.

It would be equally futile for the United States to unilaterally impose secularization in Afghanistan and Iraq. For a constitution to function, it must represent the will of its citizens. Nothing could delegitimize a constitution more quickly than America setting down secularist red lines in a well-meaning show of neo-imperialism. Rather, our goal must be to persuade a majority of the world’s 1.2 billion Muslims that Islam and democracy are perfectly compatible.

This will be especially true in Iraq, where the constitutional process must demonstrate to the Iraqi people and the rest of the world that the coalition intends to let Iraqis govern themselves. What’s more, denying the possibility of democracy within Islam may bolster the case of Islamist radicals who, for very different reasons, claim that their religion and political freedom cannot mix.

The draft Afghan constitution is just one possible picture of how Islam and democracy can live side-by-side in the same political vision. There are no guarantees in constitution writing or in nation building, and it is too soon to predict that the idea of Islamic democracy will take hold in practice—in Afghanistan or elsewhere. All we can do is continue to press for democracy in the Muslim world: not because we naively expect a victory for secularism, but because freedom only makes sense as a value extended equally to all, to make of it what they will.

Originally published in *The New York Times*, November 13, 2003.

Iraq's Hard Road to Democracy

“The basic function of any state, namely, protecting you so you wouldn’t get shot, was absent,” Professor Noah Feldman pointed out.



What are the chances that the new Iraqi Interim Constitution will lead to an equitable distribution of resources and to the preservation of basic civil liberties? About 50-50, according to NYU School of Law Professor Noah Feldman, who spoke at a dinner sponsored by the Institute for Judicial Administration (IJA) last spring, just as the final draft of the interim constitution was awaiting approval by the Iraqi Governing Council. The professor’s audience: Eight judges of the U.S. Court of Appeals for the Second Circuit, including Chief Judge John M. Walker Jr.

Feldman, who served as the senior adviser on constitutional law to the Coalition Provisional Authority in Iraq, outlined the tumultuous series of events that culminated in the newly written Iraqi Constitution, starting with the U.S.-led invasion of Iraq. In the days following the invasion, the entire Iraqi state collapsed; he described chaos so complete that one day in late May of 2003, in a poor Shia neighborhood, a man pulled at his sleeve and asked, “Excuse me sir, who is the government?”

Under conditions of anarchy such as these, explained Feldman, Iraqis were forced to fall back on their ethnic and denominational identities in order to survive. “The basic function of any state, namely, protecting you so you wouldn’t get shot, was absent,” he said. Remarkably, civil war did not result and leaders from Kurdish, Shia, and Sunni communities eventually negotiated the new interim constitutional text for the nation. “All of those groups who came to the table could have chosen not to reach an agreement,” he

told the judges, “but they did choose to reach an agreement...in which they all gave something up, and in which they all got something.” In return for more autonomy than the other regions, the Kurds agreed that oil revenues and borders will be controlled by the central government and that the Kurdish militia “will come indirectly under command of the Central Army.”

The Shia, who favor an Islamic state, have taken a risk by supporting a democratic government, and in return they have obtained “a guarantee that the state would have an official religion of Islam,” said Feldman. The now-

vulnerable Sunnis, the ethnic group of Saddam Hussein and the Baathist party, got “a guarantee in the constitution that the natural resources of the state would be divided roughly in proportion to the population.”

Professor Feldman went on to explain the importance of looking beyond the creation of a constitution and to the institutions that will establish and make that constitution meaningful. “It will take a long time to discover that collective action can have a real effect,” he said. “They have to believe that it works and that this can be the core of a process of democratization that will work.” ■

Justice and Race: When Vested Interests Change Legal Outcomes

The Eighth Annual Bell Lecture looks at “Interest Convergence” Theory today

Racial-justice advocates haven’t had much reason to rejoice recently, noted UCLA Professor of Law Cheryl Harris in her speech, the eighth annual Derrick Bell Lecture on Race in American Society. The lecture is given in honor of NYU School of Law Professor Derrick Bell, a civil rights leader and the author of the groundbreaking *Race, Racism, and American Law*.

Harris pointed to the U.S. Supreme Court’s ambivalent decisions about the affirmative action admissions policy at the University of Michigan, followed by the defeat of California’s most recent proposition banning the collection of race data. A well-known critical race theorist, Harris argued that judicial decisions about racial equality depend on whether the majority regards the



NYU School of Law Professor Paulette Caldwell, left, pictured with Professor Cheryl Harris of UCLA School of Law, who said timing and public opinion can influence the perceptions of the Supreme Court.

issue as being in its own interest. She then proceeded to examine how this “interest convergence” theory, introduced by Bell in the mid-1970s, remains relevant almost three decades later.

Harris began with the high court’s decision in the combined *Gratz v. Bollinger* and *Grutter v. Bollinger* cases. Gratz maintained she was denied admission as an undergraduate to the University of Michigan because affirmative action policies put her at a disadvantage as a white applicant. Grutter raised the same question at Michigan’s law school. The Court struck down the



Professor Derrick Bell

undergraduate admissions process, but upheld the law school’s admissions policy as not being disadvantageous for white students. Harris explained the mixed result: The undergraduate admissions policy was “too specific about how race might count as a plus, about how race matters.”

While the decision had the effect of supporting affirmative action, it revealed a deep reluctance to confront the meaning of race. The law school’s admissions policy was allowed to stand, however, and Harris argued that was because of interest convergence: Timing had changed the perceptions of the Court.

The case was argued on April 1, 2003, the eve of the U.S. invasion of Baghdad, and a group of retired generals filed an amicus brief arguing that affirmative action was crucial in admitting racial minorities to service academies and the ROTC. According to Harris, having a majority-white officer corps has resulted in low morale, racial tension, and disciplinary problems. This argument was a factor in Justice O’Connor’s swing vote, she said. “O’Connor lifted some of her language directly from this brief.”

Early in his career, Professor Derrick Bell served on the legal staff of the NAACP Legal Defense Fund, having been hired by its then-general counsel, Thurgood Marshall. During his five years at the Fund, he handled and supervised close to 300 school desegregation cases. In 1971, he became the first African American tenured law professor at Harvard Law School. He has been a member of the NYU School of Law faculty for 13 years. During those years, he has published 10 books, including three editions of his widely used text, *Race, Racism, and American Law*. His most recent book is *Silent Covenants: Brown v. Board of Education and the Unfulfilled Hopes for Racial Reform* (Oxford University Press, 2004). ■

Judges as Policymakers?

Judge Tatel presents the James Madison Lecture



Left to right: Norman Dorsen, the Frederick I. and Grace A. Stokes Professor of Law with the Madison lecturer, Judge David S. Tatel of the United States Court of Appeals for the D.C. Circuit, and Dean Richard Revesz.

Judge David Tatel, who gave the James Madison Lecture, was an engaging and even humorous speaker, but he wasn’t kidding when he talked about the danger of judicial activism.

Dean Richard Revesz hailed the talk as the “leading intellectual event of the year,” marking the 35th time the Madison Lecture was given at the NYU School of Law. Tatel, who sits on the U.S. Court of Appeals for the D.C. Circuit, presented his timely talk, “Judicial Methodology, Southern School Desegregation, and the Rule of Law,” as the 50th anniversary of *Brown v. Board of Education* approached last fall. The paper contributed to the *Brown* retrospective by shedding light on the way the politics of the 1950s influenced the historic school desegregation decision.

Tatel confided that he was worried about public perception of judges’ political motivations. “‘Judicial activist’ is a phrase usually hurled by [people] who aren’t happy with the outcome of a case,” Tatel said. “Commentators usually conclude that the judge is an appointee of President X or Y and is making decisions to fit a political agenda.”

“I’m frequently asked whether I find methodological principles restraining,” Tatel said. “Of course I do, but they’re also comforting. As Oliver Wendell Holmes said, ‘It has given me pleasure to sustain the constitutionality of laws that I believe to be as bad as possible, because I thereby helped to mark the difference between what I would forbid and what the constitution permits.’”

“You might wonder why a sitting appeals-court judge would criticize the court that reviews his opinions—or, as my friend says, ‘The court that grades his papers,’” Tatel said with a laugh. “After almost 10 years as a federal judge, I’m increasingly concerned with

the public’s perception that judges are acting as unelected political officials.”

To make his point, Tatel examined two Supreme Court cases decided in the early 1990s, *Missouri v. Jenkins* and *Board of Education of Oklahoma City v. Dowell*. Both arrived at the politically conservative outcome of limiting desegregation orders through decidedly unconservative means—splitting away from precedent.

Since *Jenkins* and *Dowell* are best understood in the context of school segregation, Tatel reached back more than three decades to the Nixon administration. Tatel played fragments from six taped conversations: Nixon’s position was clear. At one point he declared, “I want to take a flat-out position against busing. Period. I am against busing. Period.”

“The courts seemed to be performing as unelected policy-makers,” said Tatel, summing up. “Nothing could do more lasting injury to the Court and to the system of law.”

The James Madison Lectures are published in the *NYU Law Review* and also appear in *The Unpredictable Constitution*, a collection of essays about civil liberties edited by Norman Dorsen, NYU’s Frederick I. and Grace A. Stokes Professor of Law. The lectures are made possible by the Schweitzer Endowment, as well as grants from the Philip Morris Companies, the estate of Howard Cosell (’40), and others.

U.S. Supreme Court Justice Hugo Black delivered the first lecture in 1960 on the protection of freedom of speech, and other illustrious lecturers have included Supreme Court Justices Stephen Breyer, Ruth Bader Ginsburg, and Sandra Day O’Connor, as well as the late Harry Blackmun, William Brennan Jr., and Thurgood Marshall. ■

Arizona Governor “Calls In” Due to Prison Hostage Crisis

The Abrams Public Service Lecture

A large turnout of students, faculty, alumni, and friends of the NYU School of Law gathered for the annual Attorney General Robert Abrams Public Service Lecture. One important person was missing, though: Judge Janet Napolitano, governor of Arizona and the evening’s speaker.

Because of a critical hostage situation at Arizona State Prison Complex - Lewis, one of Arizona’s high-security facilities, Napolitano had to remain in her home state to oversee the crisis response. She recorded a brief video statement explaining her absence and joined the event by telephone to answer audience questions.

Napolitano described the grave situation to the tense crowd. At 6:45 a.m. on Sunday, January 18, Napolitano received a phone call informing her that a male and female guard at Lewis Prison had been taken hostage by two inmates. “When someone from your staff calls you before 8:00 a.m., it’s not going to be a good day,” she said. The inmates managed to retreat to a nearly impenetrable guard tower and successfully held off police advances for more than a week. The state’s negotiation team, working closely with the FBI, had secured the release of the male hostage. Napolitano reminded the audience that it was her call whether to authorize the end of negotiations and initiate a siege. The crisis ended after 15 days when the inmates surrendered to law enforcement—the longest running domestic hostage situation in U.S. history.

Napolitano then fielded questions about entering politics, immigration policy, her battles with the Arizona legislature, and the role of gender in law and politics. Asked about being labeled by her political rivals as too aggressive, Napolitano pointed out that a Democratic governor working with a Republican legislature has to be aggressive in order to advance her office’s agenda. A man using the same approach would never be so labeled, she added.

Elaborating on the difficulties of being a woman in a position of power, the governor said that men in politics or the law seem naturally suspicious of a woman entering “the network.” This often forces women to prove themselves beyond what is required of men. Napolitano, who was Arizona’s attorney general before becoming governor, then generated laughs with an anecdote about how she first earned the respect of her law enforcement personnel by holding her own at a firing range. “I decided not to tell them I had already been through a firearms camp during the time that I represented Smith & Wesson,” she said.

Napolitano described politics as “a full-bodied sport that you have to develop calluses for.” She elaborated on a scathing article published during her nomination in 1993 for U.S. Attorney for the District of Arizona about her representation of Anita Hill during the Clarence Thomas confirmation hearings. This was Napolitano’s first venture into public service and when she made an emotional phone call for support to a friend in politics, the



Robert Abrams ('63), former attorney general of the State of New York, explains the unusual circumstances of this year's lecture.

friend told her bluntly: “Get over it.” That was good advice, Napolitano said. She has learned to accept the rough treatment as part of the game, and now relishes the political arena.

The governor also discussed the practical difficulties in pursuing a career in public service. The reality, she said, is that many people will not be able to pursue public interest work immediately after law school because of tremendous debt. However, for those who feel forced into a firm but still desire a life of public service, Napolitano advised against adopting a cushy lifestyle. “Living modestly during the years where your income is the greatest allows you to build a war chest for things like running for elected office,” she said, warning that those who live extravagantly off of their firm salaries often find themselves bound by “the velvet handcuffs”—unable to pursue their aspirations because of paralyzing financial obligations.

The Abrams Public Service Lecture honors Robert Abrams ('63), who served in various governmental positions for 28 years, establishing a remarkable public service record. Abrams was elected to three terms in the New York State Assembly, where he achieved election law reform, changes in New York’s then-archaic abortion law, and child abuse protection. Abrams was also elected to three terms as Bronx borough president and four terms as New York’s attorney general, achieving the highest margin of victory of any attorney general in history. He launched pioneering efforts in the areas of environment, consumer, and civil rights protection. He also led the office into criminal justice prosecutions and enforcement, and achieved needed changes in the law relating to the insanity defense, organized crime, and victims’ rights. A recipient of more than 300 awards from academic, business, professional, public interest, religious, and philanthropic organizations, Abrams was honored by the Law School with its Alumni Association Achievement Award in 1981 and its Public Interest Service Award in 1993. ■



Governor Janet Napolitano speaks at a Southern Arizona Legal Aid Anniversary celebration—live and in-person!

Grutter Attorney Speaks on Key Affirmative Action Case

Miranda Massie ('96) counsels optimism



Melvyn I. Weiss ('59) and Miranda K.S. Massie ('96), a lawyer at Scheff & Washington in Detroit, at the Weiss Public Interest Forum.

“Without affirmative action, legal education in particular, but higher education in general, is resegregated,” said Miranda K.S. Massie ('96), a lawyer at Scheff & Washington in Detroit. “Affirmative action is the only effective desegregation plan for higher education. It is *Brown v. Board of Education*.”

Massie, the featured guest at the annual Melvyn and Barbara Weiss Public Interest Forum at the NYU School of Law, was an attorney for the student defendants in *Grutter v. Bollinger*, an affirmative action case decided by the U.S. Supreme Court in June 2003. The plaintiff in the case challenged the admissions procedure employed by the University of Michigan Law School, which allowed some weight to be given to race as one factor among many entrance considerations.

According to Massie, the goal of those who supported and funded the *Grutter* lawsuit, most notably the Center for Individual Rights, a conservative, nonprofit law firm, was the resegregation of higher education and the elimination of conscious attempts to address racism in our society. Massie discussed *Regents of the University of California v. Bakke*, which preceded *Grutter*, and noted that Supreme Court Justice Lewis Powell Jr. held that “diversity could be a compelling state interest sufficient to justify the use of race in higher education admissions.”

Massie defended affirmative action beyond just diversity and desegregation. “No race-

neutral measure of merit is possible in a society that is as crippled and as stunted and as distorted by racial inequality as this one,” she said. “There is no such thing as a race-neutral measure of merit.” Citing studies that have tracked the biases present in the Law School Admission Test (LSAT) and other standardized measures, Massie described how meritocracy arguments can hide deeply ingrained systemic bias.

Massie said she based her optimism for the future on Justice Sandra Day O'Connor's opinion, which she said links efforts toward diversity to “our nation's struggle with racial inequality” and makes clear that integration is necessary for social legitimacy. Nonetheless, Massie noted that challenging work lies ahead for civil litigators, such as those in California, where Proposition 209 has decreased minority enrollment at top state schools and Proposition 54 threatens to halt the collection of racial data for any purpose except law enforcement.

Throughout her career, Massie has merged her civil rights litigation with activism. She counseled the aspiring-lawyer crowd not to underestimate what they can do as new lawyers.

“You will bring a freshness of perspective when you're a new lawyer that people who have been out for a few years will not bring,” she said. “Be bold, be controversial.”

“She did a good job of placing [affirmative action] in its historical context,” Leon Kirkland ('06) said. Massie also met earlier with students in small group sessions to discuss her career path.

“It was nice to have one of our own here,” said Deborah Ellis ('82), assistant dean for public interest law. “We have so many Law School graduates doing public interest work, and we'll continue to focus on bringing them back to speak.”

The Melvyn and Barbara Weiss Public Interest Forum honors the Weisses' contribution toward making a career in public service possible for many Law School students through the Loan Repayment Assistance Program. Melvyn Weiss ('59), a senior partner at the law firm of Milberg Weiss Bershad & Schulman, is a leading authority on securities and accounting fraud. For more than 35 years, he has represented institutional and individual shareholders in complex securities class-action suits. In recent years, his pro bono work has included reaching major settlements for Holocaust victims and their families in class actions against the German government, German businesses, and Swiss banks. A trustee of the NYU School of Law, he has been the recipient of the Law Alumni Association's Alumni Achievement Award and the Law School's highest honor, the Arthur T. Vanderbilt Medal.

The Weiss lecture kicked off the Root-Tilden-Kern Monday Night Speaker Series on Public Interest Law, which continues throughout the academic year and is organized by the Public Interest Law Center.

“I see the series as a survey seminar on public interest law,” Ellis said. “My overall goal is to educate students about the range of opportunities in public service work.” ■



Grutter and Gratz, students who brought recent affirmative action suits.

Lawyers as Catalysts to Build a Just Democracy



Professor Sylvia Law ('68) and Constance L. Rice ('86), with Adjunct Professor Richard E. Blum ('89).

Civil rights lawyer Constance L. Rice ('86) gave the Rose Sheinberg Scholar-in-Residence Program's tenth annual lecture last spring.

Rice, a cousin of President Bush's national security adviser Condoleezza Rice, has served as a counsel for the

NAACP Legal Defense and Educational Fund in Los Angeles, mediated gang conflicts, and coordinated legal action that successfully pressed for more money for school construction in inner-city Los Angeles. She offered a vision of "justice as relay race," saying that the testament of hope

and equality was granted to us by the likes of Martin Luther King Jr. Rice conceded that it was easier to dismantle inequality than to construct true equality, but urged her audience to strive for a just society. "You do what you have to do given the state of the track at the time," she said.

To prevent the underprivileged from sinking further, poor whites and blacks have to develop "a grand alliance," suggested Rice. Currently a director of the Advancement Project, an organization she helped launch to take on problems of inequality and exclusion, Rice described her recently-filed litigation intended to force Los Angeles to improve its bus transit system. A crucial part of daily life for hundreds of thousands of city residents without cars, this aspect of Los Angeles' mass transit is unfairly ignored by officials, said Rice.

The Rose Sheinberg Scholar-in-Residence Program was established in commemoration of attorney Rose Sheinberg ('30), who championed women's rights. The program invites scholars working on subjects of gender, race, and class to be part of a day of informal discussions and to present the lecture. ■

Globalization and Bankruptcy Workshop grapples with cross-border issues

How is globalization changing bankruptcy law? Prominent Bankruptcy Judges Allan Gropper and Arthur Gonzalez (LL.M. '90), both of the U.S. District Court for the Southern District of New York, tackled this topic as keynote speakers at the three-day Lawrence P. King and Charles Seligson Workshop on Bankruptcy and Business Reorganization at the NYU School of Law.

Gonzalez discussed the conflicts facing countries dealing with cross-border insolvency. He noted the struggle between a country's desire for universality, in which no preference is given in loan repayment based on location, and a citizenry's preference to repay local creditors first.

"Insolvency systems must be compatible with global markets," Gonzalez said. Emerging-market countries face the politically charged issue of convincing citizens that facing bankruptcy—and experiencing what is often an immediate shock to local economies—may in the long run be a sound strategy because developing countries can prove their mettle to the global financial markets.

Speaking about the model insolvency codes proposed by the International Monetary Fund and the research conducted by the World Trade Organization on the regulation of insolvency laws, Gropper advocated new financing and new loans and discussed ways of dealing with financial crises in foreign countries. Confessing his uncertainty about whether the IMF plan can succeed, Gropper predicted that large financial institutions will be "dubious" about providing new funding, yet foreign countries would prefer to see private capital from these institutions rather than bailouts from the U.S. government and other creditors. "The movement toward globalization is going to force us to look at how our laws are recognized elsewhere, and how we want to recognize other laws here," Gonzalez said.

The King and Seligson workshop, which offers participants a choice of two tracks—a basic program for general practitioners and an advanced one for participants who are specialists—will celebrate its 30th anniversary this year. A fundraising effort is underway in order to name an appropriate space in honor of the late Professor Lawrence King, a bankruptcy expert who taught for 40 years at the NYU School of Law. ■



Southern District bankruptcy judges Allan Gropper and Arthur Gonzalez (LL.M. '90).

Annual Graduate Tax Workshop Takes on Tough Issues

Tax pros lecture on corporate tax, partnerships, estate planning, bankruptcy, and tax cuts

Nearly 100 local tax professionals and several LL.M. in Taxation students joined the NYU School of Law tax faculty for the annual Graduate Tax Workshop. Panels debated recent tax cuts, lobbied for implementation of different forms of taxes, and discussed corporate tax, partnerships, estate planning, and the secondary effects of taxation on related fields such as bankruptcy and reorganization.

Professor Noël Cunningham (LL.M. '75), director of the Graduate Tax Program at the Law School, introduced the first speaker, Daniel Shaviro, the Wayne Perry Professor of Taxation at the Law School. His speech was entitled "The Bush Tax Cuts: Steps Toward Bigger Government?" Professor Edward McCaffery of the University of Southern California Law School spoke on the fair timing of taxes. He asserted that the battle in tax policy should not be about income versus consumption taxation, but about what kind of consumption tax to choose.

Other panels included one on the Jobs and Growth Tax Relief Reconciliation Act of 2003, led by James Eustice (LL.M. '58), the Gerald L. Wallace Professor of Taxation at the

NYU School of Law, and Stephen D. Gardner (LL.M. '65), a partner at Kronish Lieb Weiner & Hellman and a member of the adjunct faculty at the Law School. T. Randolph Harris ('77, LL.M. '83), another member of the adjunct faculty at the Law School, led a discussion on estate planning and the Economic Growth and Tax Relief Reconciliation Act of 2001, while adjunct faculty member William Lesse Castleberry (LL.M. '75), also a partner at Kronish Lieb, and Professor Leo Schmolka (LL.M. '70) took on the evolving law of partnerships.

Sessions on international tax followed, headed up by Professor H. David Rosenbloom, director of the International Tax Program at the Law School, and a partner at Caplin & Drysdale in Washington, D.C. and Richard Andersen, a partner at Arnold & Porter, also an adjunct faculty member at the Law School. Norman Sinrich, an adjunct professor and of counsel at Feingold & Alpert, led a bankruptcy tax session, discussing tax considerations in corporate insolvency. He focused on pertinent sections of the IRS Code and presented problems for the audience to discuss. The workshop concluded with a session on ethics as related to professional tax work. Gershon Goldstein (LL.M. '64), a partner at Stoel Rives, presented the audience with numerous hypothetical scenarios based on current issues facing tax lawyers. These examples focused on tax planning, return preparation, and prior understandings with the IRS.

Net proceeds from the event support the Gerald L. Wallace Fund, which provides scholarships to students in the Graduate Tax Program. ■



Clockwise from top left: William Lesse Castleberry, left, partner, Kronish Lieb Weiner & Hellman and NYU adjunct professor of law, with NYU School of Law Professor Leo L. Schmolka; Stephen D. Gardner, partner, Kronish Lieb and NYU adjunct professor of law; H. David Rosenbloom, left, partner, Caplin & Drysdale, Washington, D.C. and director of the International Tax Program at the NYU School of Law, with Richard E. Andersen, partner, Arnold & Porter at the NYU School of Law, with Edward J. McCaffery, Maurice Jones Jr. Professor of Law and Political Science, University of Southern California, School of Law.

Hot International Taxation Trend

NYU/KPMG lecture sheds light on APAs

The fourth annual NYU/KPMG Lecture Series “Current Issues in Taxation” brought together three different perspectives—government, private sector, and academia—to examine the Advance Pricing Agreement Program. Currently the hottest trend in international taxation, APAs are individualized agreements between private companies and governments about the rate of taxation on inter-company business.

Harry Hicks III (LL.M. '91), associate chief counsel of the Internal Revenue Service, was the keynote speaker for the symposium, which was sponsored by the NYU School of Law Graduate Tax Program and KPMG's Tax Practice Group.

APAs help resolve taxation issues that arise from transfer pricing. There are two types: Bilateral APAs involve agreements with companies and more than one national government; unilateral APAs are agreements with the U.S. government. More than 200 APAs are currently being negotiated—over 150 bilateral APAs and more than 50 unilateral APAs with the U.S. government.

Why are APAs so popular? For officials, they're the only way to capture taxes that would otherwise never be paid. For business executives, they're a great way to accurately

determine tax liability. For academics, they're appealing because they help simplify complex international tax law.

Other panelists included Sean Foley, a principal with KPMG's International Corporate Services practice; Matthew Frank, the newly appointed director of the APA Program at the IRS; and H. David Rosenbloom, the director of the NYU School of Law's International Tax Program. ■



Panelists included Larry Pollack, partner, KPMG; Matthew Frank, the director of the IRS APA Program; Harry Hicks III (LL.M. '91), associate IRS chief counsel (international); Professor H. David Rosenbloom, director of NYU's International Tax Program; and Sean Foley, principal, KPMG.

South for the Winter

Revived tax workshop meets in Orlando

The world's leading tax professionals gathered last winter in Orlando, Florida, for the NYU School of Law Graduate Tax Program's inaugural Gerald L. Wallace-Charles S. Lyon National Tax Workshop, which combined substantive training with alumni programs. “It was like a family reunion,” said Jerald David August (LL.M. '80), a partner at August, Kulunas & Dawson of West Palm Beach, Florida, and chair of the event. “This workshop was a long overdue homecoming for graduates of the tax program.”

The three-day session drew 70 tax professionals including Marvin Kloeppel (LL.M. '00), J. Fitzgerald O'Connor Jr. (LL.M. '75), Robert Shapiro (LL.M. '61), and Susan Tom (LL.M. '75). Judges, academics, practitioners, and government officials came in from all over the United States, as well as from Italy, Germany, and Hong Kong.

The program harkened back to the week-long tax workshops held in the '70s and '80s. But August and his core workshop committee members, including NYU School of Law Professor Guy Maxfield, Lewis Steinberg ('84, LL.M. '92), Gersham Goldstein (LL.M. '64), and Richard Shaw (LL.M. '63), the current

chair of the ABA Tax Section, opted for three days, figuring that was about right.

“We really wanted to bring back the spirit and energy of the old Graduate Tax Workshop, focusing the sessions and the discussion on problem sets, model solutions, and hot topics,” said Mary Silver ('92), director of the Part-time Graduate Tax Program at the Law School. “And it just made sense to name the new workshop after Jerry Wallace and Charlie Lyon.” Wallace created the course of study in 1945, hiring Lyon soon after, and in so doing instituted a revolution in graduate legal education. The proceeds of the workshop are earmarked for the Gerald L. Wallace Fund, which provides scholarships for students in the Graduate Tax Program. Additional support for the workshop came from sponsors August, Kulunas & Dawson, Greenberg Traurig, KPMG, Skadden, Arps, Slate, Meagher, & Flom, the Brian D. Berlin Memorial Charitable Trust, and Fidelity Charitable Services.

The workshop began with a session on “Partnership Taxation” taught by NYU School of Law Professor Noël Cunningham (LL.M. '75), Terence Cuff (LL.M. '79), and Phillip

Gall ('94, LL.M. '96). Afternoon sessions focused on “Tax Procedure and Litigation” and “Ethical Considerations in Tax Practice.” Judge James Halpern of the U.S. Tax Court joined Gersham Goldstein in engaging the attendees in an analysis of frequently encountered ethical issues in taxation.

Other workshop highlights over the course of the next two days included a highly charged corporate tax discussion on spin-offs and split-offs led by Louis Freeman (LL.M. '72), Steinberg, and Eric Solomon (LL.M. '84), deputy assistant secretary for regulatory affairs at the U.S. Department of Treasury. Additional sessions focused on distressed companies, international taxation, and estate planning.

During the Friday night dinner, Jerald August, who served as the evening's emcee, announced the new Wallace-Lyon donor category, which confers Weinfeld Associate status on those who contribute \$5,000 (or more) to the Wallace Fund. He also enthusiastically accepted the honor of being the very first in the category.

For more information about next year's Wallace-Lyon National Tax Workshop, which will be held in Orlando in February, or about becoming a Wallace-Lyon donor—perhaps in time for the program's 60th anniversary dinner this April—please contact Mary Silver, director of the Part-time Graduate Tax Program, at (212) 998-6596. ■

Trade Disputes and Tax

McDaniel delivers Tillinghast Lecture

International tax law may be an arcane subject to some, but it is more crucial than ever as global trade and business create friction between nations. Professor Paul R. McDaniel, who gave the 2003 David R. Tillinghast Lecture on International Taxation, analyzed the challenges facing countries by discussing the implications for the U.S. and other nations of two recent World Trade Organization rulings.

McDaniel, former director of the Graduate and International Tax Programs at the NYU School of Law and now a professor at the University of Florida Levin College of Law, discussed his paper “Trade Agreements and Income Taxation: Interactions, Conflicts, and Resolutions.” He provided a history of the World Trade Organization’s decision on the European Union’s challenge to the Internal Revenue Code for-

foreign sales corporation rulings. The FSC regime provided a tax subsidy for U.S. exports, and the E.U. claimed the subsidy violated international trade rules under WTO agreements. The WTO agreed, holding that the FSC rules constituted a prohibited export subsidy. Congress then enacted the Foreign Sales Corporation Repeal and Extraterritorial Income Exclusion Act of 2000, known as ETI. Congress attempted to comply with the WTO decision by providing a different form of tax subsidy for U.S. exporters. But this subsidy too was challenged by the E.U., and WTO dispute resolution bodies held that the U.S. ETI regime also violated WTO rules.

McDaniel analyzed the two decisions from three perspectives: legal/structural, economic, and sovereignty/political. He concluded that the decisions were legally correct—the U.S. tax provisions constituted

“prohibited export subsidies” under the WTO. The decisions were also necessary if the agreements were to be effective. “If a country could avoid its WTO obligations simply by substituting a tax subsidy for an identical direct subsidy, the organization would be completely undermined,” McDaniel said.



David R. Tillinghast with featured speaker Paul McDaniel, now professor of law at the University of Florida, and H. David Rosenbloom, the director of the International Tax Law Program at the NYU School of Law.

From an economic perspective, he asked, “What was the impact of the decisions on the economic welfare of the United States and other countries?” He concluded that the decisions improved welfare both for the U.S. and for its trading partners.

Finally, McDaniel considered whether the WTO agreements impinged on U.S. sovereignty. He found that U.S. rules governing treaty obligations sufficiently protected concerns for U.S. sovereignty. Some have argued that the U.S. international tax system hinders the country’s multinational companies when competing with multinationals from exemption countries. Accordingly, the FSC and ETI regimes created a level playing field by exempting from U.S. tax a portion of the income earned by U.S. multinationals in foreign countries. (Multinationals from exemption countries pay no domestic tax on their foreign earnings; U.S.

this argument lacked merit because exemption systems do not subsidize exports, while that was the specific purpose of the FSC and ETI rules. In addition, he found that U.S. multinationals pay a very low effective rate of tax on their foreign earnings

The annual Tillinghast Lecture, which is delivered each fall by a renowned international tax scholar, was created to provide a forum in which leading tax lawyers and educators from around the world share ideas about current issues in international taxation. The lecture, published in the *Tax Law Review*, is jointly presented by the NYU School of Law and the New York law firm Baker & McKenzie, where Tillinghast is a partner.

A graduate of Brown University and Yale Law School, Tillinghast served as special assistant for international tax affairs at the U.S. Treasury Department before he returned to private practice in New York City. ■



corporations, however, are taxed on their worldwide income absent some exception such as was provided by the FSC and ETI rules.) McDaniel, however, found that

Making the Grade



Commencement 2004

Celebrating an “Infusion of Talent”

More than 6,000 graduates flooded Washington Square Park on Thursday, May 13, for New York University’s 172nd Commencement Exercises. Resplendent in purple robes, they entered to the music of the NYU Concert Band and the Pipes and Drums—and to the cheers, smiles, and tears of their classmates, families, and friends.

University President John Sexton and Martin Lipton (’55), chairman of the Board of Trustees, presided over the ceremonies. Sexton called the commencement exercises a “rite of passage celebrating the next infusion of talent, knowledge, commitment and energy from

NYU into the world.” He reminded graduates to appreciate their families and friends, and lauded the faculty for their “restless quest for excellence, openness and affirmative lack of contentment that drives progress.”

H. Dale Hemmerdinger (B.A. ’67), a member of the Board of Trustees and chairman of the Committee on Alumni Affairs, recognized several alumni and special guests. He and Lipton presented the 2004 Albert Gallatin Medal for an outstanding contribution to society to Kenneth G. Langone (Stern ’60), the founder of Invemed Associates, co-founder of Home Depot, and director of many companies,

including General Electric and YUM Brands.

Billie Tisch was then presented with the Lewis Rudin Award for exemplary service to New York City. The award is given to an individual whose exemplary achievements in the public realm reflect and advance the extraordinary spirit of Lewis Rudin (B.S. ’49, from what is now the Stern School of Business), a distinguished alumnus, valued trustee, and devoted friend of NYU. Ms. Tisch is currently a trustee of the September 11th Fund and the United Jewish Appeal Federation, past president of the Federation of Jewish Philanthropies of New York, a trustee at Skidmore College, vice chairman of the

United Way of New York City, and director of the Tisch Family Foundation.

Provost David McLaughlin awarded honorary degrees to several candidates. The first degree, a Doctor of Humane Letters, was presented to C. Duncan Rice, principal and vice chancellor of the University of Aberdeen. Professor Farhad Kazemi, from the Faculty of Arts and Science, presented Rice with his honorary degree. President Sexton praised Rice as a “bold architect of academic initiatives” and as a “renowned university statesman, [who] built a lasting bridge of mutual esteem between two of the world’s most foremost universities that bear the names of the great cities in which they thrive.”

Professor Marisa Carrasco from the Faculty of Arts and Science presented Judith Rodin, then the outgoing president of the University of Pennsylvania, with a Doctor of Humane Letters. Rodin is the first woman to be a president of an Ivy League institution, “a path-breaking academic leader, who led Penn to extraordinary levels of achievement,” said Sexton.

Mohamed ElBaradei (LL.M. ’71, J.S.D. ’74), was presented with an honorary Doctor of Laws. ElBaradei is the director general of the United Nations International Atomic Energy Agency. President Sexton applauded the recipient as a “diplomat, international civil servant, and peace-seeker.” The degree was presented by Law School Professor Stephen Holmes.

Finally, Richard D. Parsons, chairman and CEO of Time Warner, was presented with an honorary Doctor of Commercial Science from Vice Provost Sharon Weinberg.

In his concluding remarks, President Sexton called New York the first “glocal city”—both global and local—and praised its diversity. “NYU embraces this glocal environment and [mirrors] it deliberately in [its] curriculum, faculty, and students,” Sexton said. He pointed to the 160 flags surrounding the stage in Washington Square Park that represented the graduates’ home countries.

He pushed for an appreciation of the value of education, emphasizing that a significant part of the wealth of nations comes not from the mere growth of equipment or from more hours of labor. Rather, he said, wealth comes from the creation of new knowledge in the fields and disciplines that are the province of our universities. “The health of our society depends on our historians, classicists, and philosophers ... who enrich our social discourse by bringing the wisdom and insights of the ages to bear on the questions of our day.” He concluded by congratulating his students and their families and wishing them tremendous luck in the future.

The ceremony ended with a tribute to New York City and to the graduates of the NYU Class of 2004. ■

Law School Convocation

A tradition of leadership continues

On Friday, May 14, the Law School held its annual Convocation in honor of the graduating Class of 2004, which comprised over 800 J.D., LL.M. and J.S.D. candidates.

Dean Richard Revesz welcomed the Law School’s newest alumni and recognized the many students who were awarded scholarships or received fellowships, congratulating them on their academic successes.

Lester Pollack (’57), chairman of the Law School’s Board of Trustees, asked the class to help the Law School continue to lead in the field of legal education. He also gave the graduates a little practical career advice: offer fair judgments and always try to inspire others.

University President John Sexton praised the Law School faculty and warned the graduating class to steer clear of “sins of omission,” to show kindness and compassion, and to feel confident in “speaking truth to power.”

Two students then spoke on behalf of their classmates. Steven Budlender delivered an address for his LL.M. classmates, and Brandon Lofton spoke for the J.D. graduates. Budlender discussed the increasing globalization of law, encouraging his peers to seek out

public-interest opportunities. Lofton described his childhood dream of being a lawyer, explaining how he wanted to be a source of positive social change and to emulate legal heroes such as Thurgood Marshall.

The convocation address was delivered by Burt Neuborne, the John Norton Pomeroy Professor of Law and legal director of the Brennan Center for Justice, which aims to protect civil liberties. He is also known for his work on international Holocaust litigation. Neuborne focused on the impact that *Brown v. Board of Education* had on him as a young boy growing up in Brooklyn. He reminded the graduates that public law is an expression of private values and that constitutional law is the engine of social change. Neuborne noted that *Brown* was only the first step in a series of civil rights advances in the United States and implored the class to make sure that the voice of *Brown* lives on.

The Class of 2004, led by a Class Gift Executive Committee including students Peter Lallas and David Berman, then presented the Law School with the first-ever class gift. More than 50 percent of the class donated \$8,000 to the fund; the gift was accepted by an appreciative Dean Revesz. ■



Top left: Brandon Lofton delivers an address for the J.D. graduates. Top right: Steven Budlender delivers the address for his LL.M. classmates. Bottom left: Burt Neuborne, the John Norton Pomeroy Professor of Law, delivers the convocation address. Bottom right: Lester Pollack (’57), Chairman of the New York University School of Law Board of Trustees

Mohamed ElBaradei: Man of Peace



NYU President John Sexton, right, presents Mohamed ElBaradei (LL.M. '71, J.S.D. '74) with an honorary Doctor of Laws degree.

New York University Law School alumnus Mohamed ElBaradei (LL.M. '71, J.S.D. '74), director general of the International Atomic Energy Agency, was appointed to the post in 1997—a crucial time in the organization's history.

The IAEA grew out of the "Atoms for Peace" program in the late 1950s and was charged both with the containment of nuclear weaponry and the promotion of peaceful nuclear energy. In many ways its mission is still the same, but the post-cold-war world has presented the agency with a new set of challenges. As an Egyptian national and a strong believer in strict arms control, ElBaradei is uniquely suited to lead the organization as it faces nuclear proliferation among Islamic and Middle Eastern nations and elsewhere.

During the May graduation ceremonies, the University presented ElBaradei with an honorary degree, which joins the master's degree and doctorate he received at the Law School in the 1970s. ElBaradei's adviser during his studies was Thomas M. Franck, one of the world's leading experts in international law. Franck was so impressed by his former student that when he was asked to head the United Nations Institute for Training and Research (UNITAR), he said he would only do so if ElBaradei could be seconded from the Egyptian government to help him.

Born in Cairo in 1942, ElBaradei was already well-versed in the law before he began his studies in the United States. His father, Mostafa ElBaradei, was president of the Egyptian Bar Association, and by 1962 ElBaradei had graduated from the Law Faculty of Cairo University.

He began his career as an international diplomat with the Egyptian Foreign service in 1964, working both in New York and Geneva before enrolling at NYU. On completing his doctorate, he returned to the Egyptian foreign service before Franck asked for him to be appointed as a senior research fellow at the U.N.

ElBaradei joined the International Atomic Energy Agency in 1984. In an interview with an Iranian newspaper, he said of his move that, "I wanted to expand my role from someone who defends the national interests of a small country to one that defends the interests of human beings throughout the world."

Defending the world is no easy matter. When ElBaradei issued a detailed report in November 2003 outlining Iran's attempts to deceive weapons inspectors but concluded that there was insufficient evidence to prove the country had plans to develop a nuclear arsenal, he came under attack from the Bush administration and Arab states alike. But ElBaradei has built a reputation as a skilled diplomat who has a steadfast commitment to the principles of law. His dual heritage may at times leave him in a double bind, but an honest arbitrator rarely has a smooth passage. — D.B.



Top: Steven Budlender carries the NYU School of Law banner. Center right: Richard D. Parsons, Chairman and Chief Executive Officer of Time Warner, addresses the gathering. Center left: Law School graduates proceed. Bottom left: Josh Kagan receives the Juris Doctor degree. Bottom right: Lior Hendler receives master's and doctoral degrees.

Hooding Album 2004

It is a tradition at Convocation for graduates to be hooded by relatives or significant others who are alumni or staff of NYU School of Law. In 2003, the Law School added a new ceremonial dimension—having scholarship donors hood their graduating scholars.



Family Photos

Left to right from top:
Melissa Ahn with her brother-in-law, Steven Chung ('99)

Zev D. Benjamin with his sister, Hilla Shprung ('02)

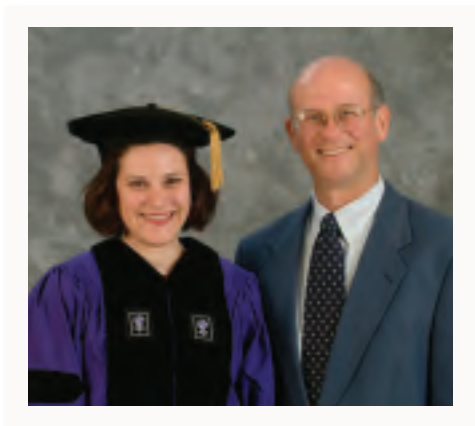
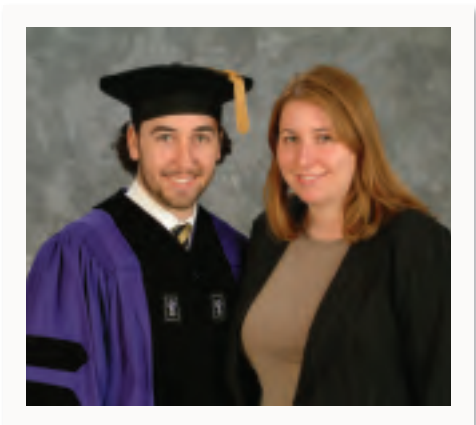
Elliot E. Chalom with his daughter Randy Chalom and brother-in-law, Robert Frastai ('96, LL.M. '99)

Yula Chin with her husband, Jack H. Nguyen ('02)

Robin J. Effron with her father, Andrew S. Effron ('JA '97)

Jill I. Goldenziel with her fiancé, Michael H. Pine ('01)

Anne K. Goldstein with her father, Kenneth Goldstein (LL.M. '75)





Family Photos

Left to right from top:
Susan Haskel with her father,
Michael Haskel ('75)

Melissa Costiere Holsinger with
her father, John Holsinger ('74)

David Evan Horn (LL.M. Taxation)
with his brother Richard Horn ('03)

Douglas E. Julie with his father,
David B. Julie ('63)

Matthew King with his brother,
Gerald W. King ('01)

David M. Lehn with his father,
David Lehn (LL.M. '86)

Libbi R. Levine (LL.M. General
Law) with her father, Mark Lee Levine
(LL.M. '69)

Benjamin Li (LL.M. Corporation
Law) with his father, Kwan-Tao Li
(LL.M. '69)

Family Photos

Left to right from top:

Thomas William Littman (LL.M. Taxation) with his father Robert Littman (LL.M. '62)

Chase Madar with his brother, Josiah Madar ('02)

John Christopher McCaffrey (LL.M. Taxation) with his father, John McCaffrey ('67, LL.M. '73), and his mother, Carlyn McCaffrey ('67, LL.M. '74)

Elizabeth Ann Moller with her husband, Robert Lemons ('99), and her father, Allan S. Moller ('70)

Gitte Lykke Pedersen (LL.M. Trade Regulation), with her sister, Rikke L. Pedersen (LL.M. '01)

Amy E. Powell with her husband, Daveed Gartenstein-Ross ('02)

Elizabeth Harris Raskin with her father, Fred Raskin ('73)

Marisa J. Savitsky with her father-in-law, Reuben Leibowitz (LL.M. '79)





Family Photos

Left to right from top:
Tracy Udell with her mother,
Justice Bernadette Bayne ('72)

Yuko Watanabe with her husband,
Tetsuji Watanabe (LL.M. '03)

Omer Wiczyc with his sister-in-law,
Kate Phillips ('98)

Boji Wong with her father, Richard
Wong ('69)

Tae Han Yoon (LL.M. Corporation
Law) with his wife, Seong Eun Kim
(LL.M. '02)

Kelly Jordan with her cousin,
Law School Dean Emeritus and
University President John Sexton

Lori Rifkin with her great aunt, Law
School Trustee Norma Z. Paige ('46)

Scholarship Donors

Right:
Morris M. Geifman Memorial Scholar
Roman A. Bilyk (LL.M. International
Taxation) was hooded by Stephen
L. Geifman (LL.M. '71)



Scholarship Donors

Left to right from top:

Norma Z. Paige Scholar David E. Blabey was hooded by Law School Trustee Norma Z. Paige ('46)

Norma Z. Paige Scholar Demian G. West was hooded by Law School Trustee Norma Z. Paige ('46)

Jack and Susan Rudin Scholar Michael Burstein was hooded by Jack Rudin

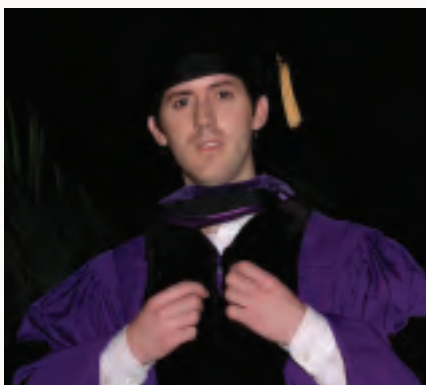
Jack and Susan Rudin Scholar Linda Carranza was hooded by Jack Rudin

George T. Lowy Scholar Rachel Demyen was hooded by Law School Trustee George T. Lowy ('55)

An-Bryce Scholar Sheridan L. England was hooded by Beatrice W. Welters

Hale & Dorr/Root Tilden Kern Scholar Rebecca Kiley was hooded by C. Hall Swaim ('64)

Pickholz Family Scholar Matthew B. Larsen was hooded by Jason R. Pickholz ('94)



Alumni Activities



Reunion Weekend

Dining, Dancing, and Discussing

Alumni participating in reunion weekend were almost as busy as students procrastinating before the bar exam. They attended receptions, dinners, tours of the Law School's new Furman Hall, and danced at the renowned Waldorf-Astoria.

But it wasn't all fun and games. Alumni from the classes of 1954 (who were inducted into the Golden Circle), 1959, 1964, 1969, 1974, 1979, 1984, 1989, 1994, 1999, and international graduates took part in four panels on topics ranging from the role of the United States in Iraq and compensation of corporate executives, to the challenge of increasing voter turnout and Holocaust-related litigation.

The interaction between distinguished faculty and alumni, such as Richard Bernard ('76), executive vice president and general counsel of the New York Stock Exchange, and Asma Gull Hasan ('01), the author of *Why I Am a Muslim*, showed once again the longstanding and diverse strengths of the NYU School of Law community.

Bringing Full-Fledged Democracy to Troubled Iraq

In a panel on Iraq, "The U.S. in the Gulf, and the Gulf in the U.S.," moderated by Benedict Kingsbury, the Murry and Ida Becker Professor of Law and director of the Institute for International Law and Justice,

Professor Noah Feldman said "the best reason to think we have a chance for democracy in Iraq is that ordinary Iraqis realize that one group can't dominate their government." Feldman served as a senior adviser on constitutional law to the Coalition Provisional Authority last spring.

Hasan addressed the relationship between Muslims and America. Hasan, an American Muslim of Pakistani descent born and raised in the United States, reminded the audience of a few crucial facts: Only 12 percent to 20 percent of Muslims are Arab, and 79 percent of Muslims in the United States vote. She encouraged the president and other high-level officials to travel to Islamic countries more often and to do more with Muslims in this country, including visiting mosques. She also pointed out that the prophet Mohammed not only wrote a constitution for the city of Medina, but he also refused, on his deathbed, to name his succes-

sor. Instead, he instructed his followers to choose their next leader themselves—a story illustrating that Islam and democracy are not strangers at all.

Talking Money: Are Executives Paid Too Much?

In the wake of scandals at WorldCom, Enron, and Tyco, compensation packages for executives have come under increased scrutiny. In a provocative discussion titled “The Executive Compensation Conundrum,” the NYU School of Law alumni and professors discussed how compensation is determined and whether the system should be changed. “We have a real problem in the United States today,” said Geoffrey Miller, the William T. and Stuyvesant P. Comfort Professor of Law and director of the Center for the Study of Central Banks, who moderated the panel. (Please see page 100 for more on Miller’s work.) “During the past 10 years, executive compensation has more than tripled,” he said. “The average CEO pay today approaches \$11 million per year.”

Miller asked the panelists to recommend ways to rein in excessive compensation. Bernard pointed out the difficulties: “Most boards would be uncomfortable setting salaries down at the 25th percentile because they think it wouldn’t be motivational and wouldn’t help retain the kind of executive they need.” Bernard suggested creating a board that is over 50 percent independent, driven by an uncompromised compensation committee chosen by an objective nominating committee. Many committees also employ independent consultants as defensive devices, explained Claude E. Johnston (LL.M. ’83), managing director in the New York office of Pearl Meyer & Partners. “Consultants can have conflicts if they’re hired by management, however, so many compensation committees hire their third-party advisers directly.”

Professor Robert Daines, then at the NYU School of Law and now the Pritzker Professor of Law and Business at Stanford and an expert in corporate finance, focused on what kind of compensation packages executives receive. “Hundreds of the largest firms let their CEOs use corporate jets for personal business. Interestingly, stock returns drop two percent on average when companies disclose that the jet is being used by CEOs. It seems like it would be better to just give the CEOs cash and let them rent [the jets].” Why do shareholders view the use of corporate jets so negatively? People might think it indicates that other bad things are happening within the company, Daines explained. “It’s like judging a restaurant on its bathrooms—if it’s dirty where people can see it, what’s happening back in the kitchen?” (Continued on next page.)



Reunion 2004: Honorees, from left to right, are Tanya E. Coke ('94), Marcia Robinson Lowry ('69), Martin S. Garbus ('59), Herbert M. Wachtell ('54), and David Rudenstine ('69) with Dean Richard Revesz.

The Law Alumni Association Awards Luncheon

After the four panels, alumni and faculty made their way to the Greenberg Lounge to reminisce over lunch and to celebrate achievements within their ranks as the LAA presented awards to five outstanding NYU School of Law graduates.

Recent Graduate Award

Katherine Frink-Hamlett ('91) presented the Recent Graduate Award to Tanya Coke ('94). As an independent consultant, Coke helps nonprofit organizations become more strategic in designing programs and raising money. She also worked as director of the Criminal Justice Initiative and counsel to U.S. programs of the Open Society Institute.

Public Service Award

Patricia Hennessey ('79) presented the Public Service Award to Marcia Robinson Lowry ('69), the executive director of Children's Rights, the leading national, nonprofit organization advocating for the rights of children in foster care. Lowry and Stewart Pollock ('57), a retired New Jersey Supreme Court judge and a trustee of NYU School of Law, recently won a high-profile case against New Jersey's youth and family service department, proving that it did not protect four children from their foster parents who systematically starved them over several years. As a result of this litigation, the state created an office of child advocates, which is headed by another NYU School of Law alumnus, Kevin M. Ryan (LL.M. '00).

As she accepted her award, Lowry told the story of a little boy who, after being abused by his mother, was shuttled through 11 foster-care homes, until one day he climbed into a garbage can and asked to be thrown away. “Kevin had been thrown away by the system,” said Lowry. “I want to fight until I never hear another story like that again. It’s a privilege to be these children’s lawyer.”

Legal Teaching Award

Then Law School Vice Dean Stephen Gillers ('68) awarded David Rudenstine ('69), the dean of Cardozo School of Law, the Legal Teaching Award for his excellence in legal

teaching. Rudenstine reflected on the public perception of lawyers: “Consider Atticus Finch in *To Kill a Mockingbird*. Since then, we’ve had many scandals and that stature of lawyers has never quite returned. But as I look around this room, I see great lawyers and good people, who hold on to our freedoms. Our liberties would not be as they are today without lawyers to define, protect, and enhance them and to tell people what’s at stake when governments try to limit them.”

Alumni Achievement Award

“It’s a personal privilege and honor to recognize my teacher, friend, and mentor, Marty Garbus,” said LAA President Paul Kurland ('70) as he presented the award for Alumni Achievement. “As one of our country’s leading trial lawyers, he represents causes as well as clients.” Garbus ('59), a partner at Davis & Gilbert and the author of four books, helped draft a new constitution for the Czech Republic. He has taught at Columbia and Yale, and is currently teaching in China. “I thank each of you for this award,” he said, “and I thank NYU for giving me a lifetime of law.”

Judge Edward Weinfeld Award

“Herbert Wachtell excels at everything he does,” said Dean Revesz as he presented the Judge Edward Weinfeld Award. “A great deal of the success of this law school is due to Herb and the support of his firm.” Wachtell ('54) graduated first in his class, was editor-in-chief of the *NYU Law Review*, received a Root-Tilden Scholarship, and is a founding and senior partner of Wachtell, Lipton, Rosen & Katz. Said Wachtell: “When we started our firm, every lawyer was from NYU. We have since let down the barriers and permitted a few others, but we’re still an NYU firm as to the standards we set and our beliefs about how law should be practiced.”

Campaign Coverage

“Politicians, Voters, and the Media: Explaining the Communications Gap,” a panel led by former Russell D. Niles Professor of Law Larry Kramer (now dean of Stanford Law), explored how best to create an informed and engaged electorate. Obstacles include politicians beholden to interest groups, voters with “MTV attention spans,” and the media’s unbalanced focus on sound bites, he said.

Stephen Salyer (’79), president and chief executive officer of Public Radio International, said studies show that peo-

Norton Pomeroy Professor of Law and legal director of the Brennan Center; Michelle Freda Weitz (’01; LL.M. ’04), assistant settlement counsel on the Swiss Bank litigation; and Adele Bernhard (’76), director of the Criminal Defense Clinic at Pace Law School—discussed the details and implications of these watershed cases.

Weiss, who was a lead counsel, pro bono, in the Swiss bank litigation that recovered \$1.25 billion and a lead counsel in recovering more than \$5 billion for German Holocaust victims, began by describing his

Semitic activities. We deliberately chose to focus on Ford first because we wanted to show the Germans that we weren’t being biased in our selections of who we held accountable. The industries treated it all like business and knew they should appear to express remorse. We ended up getting \$5.2 billion into a German Foundation to compensate the victims.”

These ground-breaking cases also raised some intriguing philosophical questions that Neuborne was happy to discuss. “Is monetizing the Holocaust something anyone should ever consider doing? Have we reduced it to dollars and cents?” asked Neuborne, who was a lead counsel in the litigation against Swiss banks, working pro bono, and a principal lawyer in the litigation against German corporations. “On the other hand, has the historical record been changed so that the Holocaust can never be ignored? Have we helped these people by recovering this money? My answer: Taking money from unjust enrichment and giving back to the victims has the feel of justice.”

Bernhard, who is involved in the Innocence Project, is trying to apply those hard-earned lessons in the United States today. “I thought the best solution was for the states to provide statutes that would work like worker’s compensation,” she said. “You don’t need to find someone to blame for the activity that hurt you. You just have to show that you went to jail when you shouldn’t have, whether it was because of a police officer who didn’t investigate well, a witness who made an error, or some other reason.” And once that’s demonstrated, there should be a monetary remedy, she said. “I believe in a right to compensation for those who have been unjustly convicted.” ■

“You don’t need to find someone to blame for the activity that hurt you. You just have to show that you went to jail when you shouldn’t have, whether it was because of a police officer who didn’t investigate well, a witness who made an error, or some other reason.” —ADELE BERNHARD (’76)

ple are shifting away from the nightly news and daily newspapers for political information, and turning instead to cable networks and the Internet. Nicholas Baldick (’95), national campaign manager for Democratic vice-presidential candidate John Edwards, offered a harsh critique of the media, which he deemed too negative. What is needed, Baldick said, are more town hall meetings and debates, and more active voters like Iowans. The former U.S. senator from Oregon, Robert Packwood (’57), currently president of Sunrise Research, cited specialized reporting, such as that done by trade newsletters, as examples of serious coverage. Seth Gitell (’94), press secretary to Mayor Thomas Menino of Boston and a former reporter for *The Boston Phoenix*, said long-form journalism, such as *New Yorker* articles and *Frontline* pieces, are essential to informing voters.

Fighting for the Rights of Holocaust Victims

NYU School of Law faculty and alumni have been key players in litigation that has helped Holocaust survivors and their families recover more than \$8 billion in assets. In a panel moderated by the Honorable Dennis Jacobs (’73) of the U.S. Court of Appeals for the Second Circuit, four members of the NYU family—Melvyn Weiss (’59), a senior partner of Milberg Weiss Bershad & Schulman and trustee of the Law School; Burt Neuborne, the John

legal strategies. “We realized that it wasn’t just about Jewish people. The German industrial complex forced 1.7 million people into slave labor. About 250,000 were laborers in concentration camps, who worked until they died; others were forced laborers, taken from their homes to work in camps without pay. We uncovered some shocking research. For example, Ford Motor Company had had a plant in Germany. When the female workers had babies, the babies didn’t survive. I documented Henry Ford’s anti-



Professor Noah Feldman discusses the Iraq situation.



Lipton, Jones, and Cosby Honored by Brennan Center

The night began with actor Alec Baldwin imploring the lawyers in the room to donate more money to the Brennan Center for Justice at the NYU School of Law and ended with a pledge from comedian Bill Cosby to begin funding the Law School's Thurgood Marshall Scholarship.

The Brennan Center's Legacy Awards dinner, which drew nearly 800 people, is held annually to pay tribute to the values of U.S. democracy and to raise funds for the Center. This year, Martin Lipton ('55), chair of the NYU Board of Trustees, Elaine Jones, president and director-counsel of the NAACP Legal Defense and Educational Fund, and Cosby were recognized for their human justice work.

Lipton, honored for his dedication to the relationship between the NYU School of Law and the Brennan Center, exemplified the evening's theme of partnership. "The key to Marty's heart—the reason why he is being recognized here tonight—is to celebrate the NYU relationship," said Thomas Gerety, the Center's executive director. "This relationship is central to the success of the Brennan Center."

Nancy Brennan, daughter of the Center's namesake, U.S. Supreme Court Justice William J. Brennan Jr., and a board member,

Golden Moment for Root-Tilden-Kern

The Root-Tilden-Kern Scholarship Program celebrated its 50th anniversary last spring with a day of panels about the current state of public interest law followed by an evening of celebration at the Rainbow Room. Keynote speaker Professor Alexander Boraine set the tone for the reunion by talking about what motivates people to fight for human rights. Boraine, the founding president of the International Center for Transitional Justice and an adjunct faculty member at the Law School since 1999, struggled for years against apartheid in his native South Africa, serving as vice chairman of the South African Truth and Reconciliation Commission. He put the matter simply: "It is always the same kind of question, 'What do I owe the world? What kind of contribution can I make?'"

Tough questions, as illustrated in a spirited panel led during the day by Steven Kelban, the former executive director of the Root program, that analyzed and celebrated changes brought about by Roots in the judiciary, government, law firms, and public interest organizations. Kelban, who started the Law School's Public Interest Law Center, and is now the executive director of the Andrus Family Fund, which bankrolls community projects, said he was inspired by his time with Root alumni. "These graduates continue to make a real difference in people's lives," he said.

During another panel called, "The Challenges Globalization Poses for Public Interest Law," several speakers maintained that between the war on terrorism and the war in Iraq, it's a difficult time to be an American working on international human-rights efforts. For many decades, the U.S. led the world both in official action and in private work. But the panelists argued that the U.S.'s unilateral approach to Iraq, the recent handling of detainees in

Guantánamo Bay, Cuba, and an administration that puts a lower priority on international human rights have left its reputation tarnished. "The effect of and reaction to terrorism increasingly affects our credibility," noted moderator Thomas Buergenthal ('60), the American judge on the 15-member International Court of Justice. "It will set the whole U.S. human rights movement back."

Boraine made a similar point when asked whether the leaders of the anti-apartheid movement would turn to the United States for help in the same way they once did, if the struggle were arising now. He lamented that it



Thomas Buergenthal ('60)

would not be so clear that the United States would be the place to turn. "The United States must get back its focus," he said. "It is an incredible country, with so much potential and power, but it's actually ruining its own reputation. America must remind itself of its values."

When asked about what lessons he could offer the United States about Iraq, Boraine listed a number of distinct areas that America must address to achieve reconciliation and restoration. The United States "must consult," he said, "not just control." He also stressed the importance of having a legal code that protects ordinary people and of creating and preserving a free, independent justice system.

Such sobering and thought-provoking reflections certainly made clear that although the Root-Tilden-Kern program has accomplished much to be proud of, the need for lawyers who are creative and thoughtful problem-solvers is going to be even stronger during the program's next half-century. ■



Actor and comedian Bill Cosby accepts the Brennan Legacy Award for his commitment to education and his passion for fairness and equality.

seconded that sentiment. “Partnerships can sometimes be marginal, but at the Brennan Center, they are part of the weave of what we do. This partnership and all of our partnerships help a smallish organization to have a great impact.”

Lipton was introduced by John Sexton, president of New York University and former dean of the Law School. “Marty Lipton is a man who deserves to be honored by all of us simply for the kind of man he is,” Sexton said. “This is a man whose spirit and generosity is legend.”

Lipton modestly accepted his award, noting that it took more than a few calls to convince him to be a recipient. “I am here because of a great, great partnership between four friends forged 50 years ago at the New York University School of Law,” Lipton said, referring to the creation of his law firm Wachtell, Lipton, Rosen & Katz in 1965 by himself and three other NYU School of Law graduates, Herbert Wachtell (’54), Leonard Rosen (’54), and the late George Katz (’54).

Lipton was heralded not only for his commitment to the NYU School of Law, but also for his leadership and generosity to major educational and cultural institutions benefiting equality and human dignity. Through his firm, Lipton has spearheaded various efforts in the public and private sectors, including the establishment of a \$5 million scholarship fund at New York University for the dependents of firefighters, police officers, and emergency medical personnel who died during the rescue efforts after the attacks at the World Trade Center on September 11, 2001.

Lipton also served as president of the NYU School of Law Board of Trustees for 10 years and is a recipient of the University’s Gallatin Medal, the Law School’s Vanderbilt Medal, and a Presidential Citation.

The Brennan Center, created in 1995 by Brennan’s family and his former clerks, has dedicated itself to promoting equality and human dignity through scholarship, public education, and legal action. The Center’s projects include reforming the campaign finance system, promoting fair courts and democratic participation, increasing economic justice and access to the courts, and improving criminal justice policy. The Center represents a new model of public-interest legal advocacy not only because of its wide-ranging docket of cases, but also in large part because of its relationship with the NYU School of Law, which connects the lawyers and advocates employed at the Brennan Center with the scholars of the Law School.

“We hope to make this a model in the country at large to put idea people together with advocates,” Gerety said. ■

A.G. Speaks at the Annual Alumni Luncheon



New York State Attorney General Eliot Spitzer stresses that moral failures are not restricted to Wall Street.

Eliot Spitzer’s reputation of aggressively pursuing white-collar criminals may have earned him tabloid nicknames like “the sheriff of Wall Street” and “the enforcer,” but his dynamic personality is hardly an anomaly in the history of the New York State Attorney General’s Office. However much ire Spitzer has sparked from the Wall Street wrongdoers he has chased, few would argue that he is any more a maverick than one of his most notable predecessors: Aaron Burr.

Spitzer mentioned this little-known historical fact about the third vice president when he spoke at this year’s Annual Alumni Luncheon at the Pierre Hotel in Manhattan. Dean Richard Revesz, who introduced the keynote speaker, commended Spitzer for his accomplishments as the state’s 63rd attorney general, most notably his victories in environmental matters, where the federal govern-

ment that does not limit itself, and has not limited itself, to the private sector,” Spitzer said. “We have had crises in the not-for-profit sector, in the elected branches of government... in the media, in our religious denominations.”

He also talked about the problem of federal overstepping, of a tendency toward preemption of state efforts. He cited the Office of the Comptroller of Currency, a federal agency currently in charge of protecting customers, as an example. The OCC has often been criticized for being assigned too much responsibility for efforts that states are more equipped to handle. “The OCC doesn’t have the people, doesn’t have the resources, doesn’t have the track record to deal with these types of cases,” Spitzer said.

Spitzer thanked attendee Robert Abrams (’63), another one of his predecessors as attorney general and currently a partner at Stroock & Stroock & Lavan. Abrams also

Attorney General Eliot Spitzer has earned respect nationwide by taking corporate criminals, mafia big-wigs, and reckless polluters to task with equal ferocity.

ment has been relatively passive. Spitzer has earned respect nationwide by taking corporate criminals, mafia big-wigs, and reckless polluters to task with equal ferocity.

Spitzer discussed some of the efforts his office has made to improve accountability in the state and beyond, particularly in the securities industry. He pointed out that moral failures are not restricted to Wall Street and that all segments of society must be vigilant in enforcing ethical behavior. “This is a crisis

happens to be the person who gave Spitzer his first job—as a summer intern in the Attorney General’s Office.

The program, which drew some 400 attendees, concluded with outgoing LAA president Marvin Lerman (’65, LL.M. ’70) passing the torch to his successor, Paul Kurland (’70), while expressing thanks to those who had made his term a success: “I want to thank all of my board members who worked so hard for me in the last several years.” ■

The Good Fight

BLAPA honors four outstanding alumni who are battling for social justice

The NYU School of Law not only turns out good lawyers, it turns out lawyers who do good. Four outstanding alumni were honored for their achievements and commitment to social justice by the Black, Latino, Asian Pacific American Law Alumni Association (BLAPA) at their annual dinner last April.

When entertainment lawyer Lisa Davis ('85) attended the Law School, racism was an insidious reality. "Call-backs for students of color during Early Interview Week were rare," she said, and students of color rarely landed jobs with large firms. "We were told [by hiring partners] that 'people like to hire people who look like them.'" Now a partner at New York-based Frankfurt Kurnit Klein & Selz, Davis was named one of "America's Top Black Lawyers" by *Black Enterprise* magazine. Davis has spent much

of her professional life fighting inequity, from working as chairperson of the East Harlem School at Exodus House to her more recent involvement in providing cultural enrichment with the Bedford Stuyvesant Restoration Corporation. Her BLAPA award honored these diligent efforts. Keeping with the upbeat spirit of the event, she used her acceptance speech to reiterate her vow to "never be complacent in the face of discrimination."

Bryan Pu-Folkes ('94), a former corporate lawyer whose commitment and dedication to public service took him out of corporate work and into immigrant communities, also received a distinguished service award from BLAPA. As the head of the New York City Commission on Human Rights, Pu-Folkes deals with all types of



BLAPA Scholarship winners from left to right, Michael Hing ('04), Chitra Aiyar ('04), and Ming Chen ('04)

discrimination, from race to sexual orientation to disability. And in 1999, Pu-Folkes founded New Immigrant Community Empowerment (NICE), a New York-based nonprofit organization seeking to civically educate and empower new immigrants.

Elgin Clemons Jr. ('94) was honored for his efforts in urban economic development. The Root-Tilden graduate is the former CEO of the Economic Development Cor-



The Society of the Torch



"I have chosen to make my bequest gift to the Root-Tilden-Kern Program.

My work with the Program has been most enlightening and personally enjoyable. As an early circuit secretary trying to entice students from Midwestern colleges to consider NYU and later as a member of the judges' panels that made the difficult choices of final selection, I have learned firsthand how an institution driven by the needs of public service and professional excellence can grow while making a meaningful difference to its students and the larger community it serves. The Program was well founded and has adapted to needs and modern conditions. The Root Program will continue to receive my support; the cause is indeed worthy."

Wayne R. Hannah Jr. ('57) is a member of New York University's Society of the Torch, a group of alumni and friends who have established bequests and charitable trusts that benefit New York University.

By including the Law School in your estate plans, you can achieve significant tax and financial benefits, while helping to ensure that future generations of students receive the best legal education in the world. If you would like more information about including the Law School in your will, please contact Marsha Metrinko (see contact information below). All inquiries will be handled in confidence.

Also, if you have already included a gift for NYU School of Law in your estate plans, please contact the Law School so that we may thank you and officially welcome you as a member of the Society of the Torch.

Please contact:
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poration for Trenton, a nonprofit real estate development company with a mission to improve Trenton's economic, social, cultural, and physical environment through development and redevelopment projects. As a student, Clemons also won the NYU Greene Memorial Award for Trial Advocacy, which is the highest award given to a prospective trial lawyer in the graduating class.

U.S. Federal District Court Judge Ronald Guzman ('73) received an award for a distinguished career that includes work with the Association House of Chicago, a legal services program that provides free representation for members of the largely Latino and African-American communities in the Chicago area. He also served as a magistrate judge in the Northern District of Illinois for nine years, before being appointed a district court judge for the Northern District of Illinois by President Clinton in 1999.

BLAPA also awarded three \$3,500 scholarships against outstanding debt to third-year minority students who are already working hard in the public interest. The winners: Chitra Aiyar ('04), for her efforts on behalf of The Door and the Association of Community Organizations for Reform Now (ACORN) High School for Social Justice in Brooklyn; Michael Hing ('04), who interned at the Office for Civil Rights at the U.S. Department of Education and works with the New York Consortium for Worker Education; and Ming Chen ('04), who helped establish the west coast version of the Harvard Civil Rights Project and worked at the U.S. Equal Employment Opportunity Commission and the Brookings Institution.

A new BLAPA executive board, led by Michelle Meertens ('98), was also ushered in at the dinner. Meertens got her tenure off to a strong start, urging not only the award winners, but everyone in the audience to continue their noble fight against racial and ethnic inequalities. ■



BLAPA honoree Judge Ronald A. Guzman ('73) with Linda Gadsby ('92)



Grutter-Gratz commentators from left to right: Thomas Gerety, Miranda Massie ('96), Professor Sylvia Law ('68), Melissa Woods, and Manuel Klausner ('62, LL.M. '63).

The Impact of *Grutter* and *Gratz*

Two high-profile cases send mixed messages about the future of affirmative action

The race-conscious admissions policies applied by the University of Michigan and the lawsuits that sought to eradicate those policies were the topics of discussion in a symposium sponsored by the Law Alumni Association and the Black, Latino, Asian Pacific American Law Alumni Association last fall.

Four attorneys who were involved in those cases, *Grutter v. Bollinger* and *Gratz v. Bollinger*, examined the question, "The University of Michigan Cases: What Do They Mean for Affirmative Action and Where Do We Go From Here?" In *Gratz*, the university's undergraduate admissions program, which awarded underrepresented minorities bonus points on an admissions scale, was struck down as unconstitutional; in *Grutter*, a policy of conferring favor on individual minority applicants to the university's law school was upheld.

Melissa Woods, assistant counsel at the NAACP Legal Defense and Educational Fund, represented student intervenors in the *Gratz* case and was deeply disappointed by the decision. Under the point system that was struck down, four of the five factors—school attended, curriculum, geography, and alumni legacy—favored white students, according to Woods. "Some sort of preference needed to have been done to make up for that difference."

A majority of the panelists were supporters of the *Grutter* decision backing affirmative action. Miranda Massie ('96), who served as lead counsel for the student intervenors in

Grutter, said she made arguments in that case about the necessity of affirmative action in today's society "that continues to be in many ways a caste society." She attacked law schools' reliance on LSAT scores for admissions, citing a study that showed white students score 9.2 points higher on the LSAT than students of color after controlling for college GPA and major. "It's a test that has been proved to be racially biased," Massie said. "To use it as a putative measure is completely unacceptable and a tool of re-segregating our society." Thomas Gerety, executive director of the Brennan Center for Justice and former president of Amherst College, agreed with Massie that the LSAT might be biased against people of color, but he argued that law school admissions boards are unlikely to abandon it. The question, he said, is what should be done about the bias?

Panelist Manuel Klausner ('62, LL.M. '63), general counsel of the Individual Rights Foundation and an affirmative action opponent who filed amicus briefs in both cases, said that until *Grutter*, a strict scrutiny standard existed for finding a compelling state interest in upholding affirmative action policies. "The Court abandoned the whole concept of using strict scrutiny, and race was allowed to be used. I submit that the case, at bottom, was a political decision."

Massie and the others saw it differently, arguing that *Grutter* was a good decision for the right reasons—and a case that will have a huge long-term impact. ■

The Art of the Deal

Why real estate is more than just numbers

“You’ve got to like the deal,” said Alan Pomerantz (’68), describing the key to success for any real estate lawyer. “The deal has to be more important than anything else.”

Pomerantz, a partner at Weil, Gotshal & Manges, was one of the most influential real estate attorneys in the country to offer his secrets for success at a panel on “Careers and Trends in Real Estate Law,” sponsored by the NYU School of Law’s Real Estate and Urban Policy Forum and the Andrew (’92) and Justin (’96) Segal Real Estate Forum. Pomerantz also encouraged students to learn economics, but to study it in a way that emphasizes psychology over charts. “Understanding why people do what they do is essential to representing people in real estate,” he said.

Professor Michael Schill, then the Wilf Family Professor of Property Law and director of the Furman Center for Real Estate and Urban Policy and now the dean of UCLA School of Law, moderated the event, where

panelists discussed the ins and outs of real estate legal work in New York City.

Jonathan Mechanic (’77), a partner and head of the real estate department at Fried, Frank, Harris, Shriver & Jacobson, praised his alma mater’s real estate curriculum and explained his reasons for pursuing real estate law. “If you like walking around the city of New York—and I love it—there’s just no other practice of law where you can walk down the street and see different projects that you had some involvement in.” Mechanic also discussed his recent project representing the buyer of the GM Building, which was sold for \$1.4 billion, a record-breaking price.

Ross Moskowitz (’84), a partner at Stroock & Stroock & Lavan, noted that students’ choice of the NYU School of Law was an enormous step toward success in real estate work. “The Law School has one of the best real estate curriculums around.” He added that his love of the city also influenced his choice. “I became a real estate lawyer because you can smell it, you can touch it, you can feel it.”

Moskowitz discussed a real estate transaction familiar to students: the new Law School building. He explained the different stages of the deal—understanding the zoning laws, negotiating with neighbors, securing tax-exempt financing, responding to a lawsuit filed to stop construction, and settling the lawsuit.

Meredith Kane, a partner at Paul, Weiss, Rifkind, Wharton & Garrison and a graduate of Harvard Law School, and Jennifer McCool, an associate at Schulte Roth & Zabel and graduate of New York Law School, also participated in the panel.

“Tell the assigning partners what you want to do, what you haven’t done yet,” said Kane. “Almost every law firm will take the opportunity to develop you into a well-rounded lawyer.” McCool added that young lawyers should attend seminars whenever possible. “If you’re the youngest face in the room, then good for you,” she said.

The panel was organized by Nicholas Bagley (’05) and Joshua Babbitt (’05), co-chairs of the Real Estate and Urban Policy Forum, a Law School student organization that connects students to New York City’s real estate and urban economic-development worlds. ■

Second Annual “Halfway There Dinner”



Committee chair Bradley Smith (’74) reports his class’s fundraising progress.

Ten alumni class representatives of the NYU School of Law gathered this January not for a reunion, but to get ready for one. The second annual “Halfway There Dinner,” which marks classes’ fundraising progress, was once again a success. The event, held at the New York Palace Hotel in midtown Manhattan, brought together reunion committee members from each of the classes scheduled to celebrate on campus during the following spring. The fundraisers were able to check in and report on their fundraising efforts.

This year marked the fiftieth anniversary of the Class of 1954, and its members were well represented at the planning dinner. Among them were Benjamin F. Crane (’54), who was in the inaugural class of Root-Tilden Scholars, and Joseph L. Hornstein (’54), who was called out of the Law School and into

the U.S. Navy for two years before returning to complete his studies.

Also in attendance were several students from the Class of 2004. A group of enterprising current students has formed the first ever Graduation Class Gift, and its executive committee members were on hand to share the good news. To pay for the gift, the committee was gathering donations from members of the Class of 2004 in what it hoped will become an annual tradition of giving something back to the Law School as students enter the profession.

“We want to demonstrate now, while we are still at the Law School, that we love NYU and are committed to its continued excellence,” said Peter Lallas (’04), chair of the 2004 committee and one of the students who came up with the idea of giving a class gift.

“We want to show our alumni that we recognize that it is their financial commitment that makes the incredible opportunities NYU School of Law provides possible,” said Lallas, adding: “We want to show those schools with five times our endowment that we can play, too.”

David Berman (’04) said the decision to join the gift committee was automatic. “Everybody wins when the class is involved,” he said. “The school gets the funding it needs and that in turn helps the school provide the kind of learning environment that brings worldwide prestige for NYU.”

All of the reunion committee members who attended reported that they were well on their way to meeting their fundraising goals; the overall effort was already above the halfway mark.

“We’re so fortunate to have such committed alumni,” said Jeannie Forrest, Associate Dean for Development and Alumni Relations at the Law School. “Everybody is so proud of the school and its mission—plus seeing former classmates for dinner is a great bonus.” ■



Ferguson Scholar David Lenter (LL.M. '04) with NYU School of Law Trustee M. Carr Ferguson ('60)

M. Carr Ferguson Tax Scholarship

In December 2001, alumni of the Law School's Graduate Tax Program came together, through the leadership of Francis Blanchfield ('70, LL.M. '74), to acknowledge the legacy and accomplishments of beloved Law School professor and eminent tax practitioner M. Carr Ferguson (LL.M. '60). The effort was designed to fund a fellowship in Ferguson's name in recognition of his retirement, and as a lasting tribute in the tradition of the fellowships that bear the names of NYU tax luminaries James Eustice (LL.M. '58), Charles Lyon, and Gerald Wallace.

Blanchfield sent a letter to all 9,000 NYU School of Law tax graduates describing his vision for the M. Carr Ferguson Fellowship in Graduate Tax. The fellowship would support a student in the NYU School of Law Graduate Tax Program who wished to pursue a career in government or academia. Blanchfield declared that if this fundraising effort identified even one practitioner like Carr Ferguson, it will have made a difference in the world.

Clearly, Ferguson is beloved. The alumni response to this effort over the past two years has been significant. The fellowship has raised more than \$350,000 and the Law School awarded the first fellowship to David Lenter in the fall of 2003. Lenter attended Brown University, where he graduated *magna cum laude* and Phi Beta Kappa. He received his J.D. *cum laude* from Harvard Law School, where he was the primary editor for the *Human Rights Journal*, a news writer for the *Harvard Law Record*, and the president of the Harvard Society for Tax Law and Policy. He took a leave of one year from Harvard to research 19th-century tax records for a corporate history project with a Brown professor and to work on a publicity campaign for the Fresh Air Fund. This year he was a research attorney for the Office of Tax Policy Research in Ann Arbor, Michigan. ■

Dean's Roundtables: Talking over Lunch

The popular "Dean's Roundtable Luncheons" hosted by Dean Richard Revesz bring students together for intimate conversations with alumni about different career paths within the law. The guests speak about their work experiences, sharing advice and insights about how they found their way.

In the last year, guests of honor have included: John Redpath (LL.M. '78), senior vice president general counsel, Time Inc; Tracy Rich ('77), vice president and general counsel, The Phoenix Companies, Inc.; Stephen Hammerman ('62), deputy commissioner, Legal Matters, New York City Police Department; Jeff Greenblatt ('83), president, Monarch Capital Holdings, LTD; Ronald Jacobi ('71), of counsel, Bryan Cave LLP; Helaine Barnett ('64), then attorney-in-charge of the Legal Aid Society Civil Division, and now president, Legal Services Corporation; Ann Kappler ('86), senior vice president and general counsel, Fannie Mae; Max (Harold) Messmer ('70), chairman, president, and CEO, Robert Half International; John Dealy ('64), president, The Dealy Strategy Group, LLC; Barbara Shulman ('83), senior vice president general counsel, National College Sports Network; John Lieber ('90), senior vice president, Silverstein Properties; Joel Litvin ('85), executive vice president, Legal and business affairs, National Basketball Association; Scott Hoffman ('87), managing director, Lazard Freres & Co. LLC; Sheila Birnbaum ('65), partner, Skadden, Arps, Slate, Meagher & Flom; Sara Moss ('74), senior vice president, general counsel, and secretary, The Estee Lauder Companies; Walter Harris (LL.M. '82), pres-

ident and CEO, Tanenbaum-Harber Co. Inc.; and Francois Chateau (LL.M. '82), partner, Salans.

Marc Platt ('82), producer of *Jerry Maguire*, *Silence of the Lambs*, and Broadway's Tony Award-winning musical *Wicked*, participated in an especially engaging and frank roundtable with students last fall, described below.

A Smashing Combination

Demonstrating how legal skills can enhance and shape a career in the arts, Marc Platt ('82) was the guest of honor at the October 28, 2003, Dean's Roundtable. Before starting his own entertainment production firm, Marc Platt Productions, Platt served as president of production for Orion, TriStar, and Universal Pictures. He has produced such other hits as *Dances With Wolves*, *Philadelphia*, and *Legally Blonde*.

"Careers are marathons, not sprints," Platt said. "There is no right approach—do what makes you satisfied professionally." He urged students to be long-term planners and to take risks in order to reach their goals.

Platt's own unconventional path began when, as a student at the University of Pennsylvania he came across a musical production of *Assisi*, based on the story of St. Francis of Assisi. He organized a successful, limited-run "equity showcase" at New York's St. Clement's Theater, but once he tried to move the show into a larger venue, he realized that attorneys and agents were in control.



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“Art and business go hand in hand,” Platt said. It was that interdependence that inspired him to go to the Law School in order to be the “smartest one in the room” the next time he faced a similar negotiation.

At NYU, Platt focused on entertainment law and intellectual property courses, and independently obtained internships with Broadway producers. He had no intention of becoming a practicing attorney until Liz McCann, one of those producers he interned for, changed his mind. He headed to a small firm where he was able to get immediate entertainment experience. The legal skills he learned as a transactional lawyer at the firm “set [him] apart from [his] peers,” and Platt now considers the experience invaluable.

After a short tenure at the firm, Platt went to work for agent Sam Cohn of International Creative Management (ICM), who wanted a lawyer to negotiate his deals. At 26 years of age, Platt was representing names from Woody Allen and Bob Fosse to Whoopi Goldberg and Cher, establishing trust and ties to major industry stars.

With help from those relationships, Platt returned to his goal of working on the creative side of the industry. His famous client Woody Allen made films at Orion, and Orion hired Platt to be a creative executive, a position that would allow him to work in the studio and handle both business and creative roles.

“I moved to California for a year,” Platt said. “That was 17 years ago.” In just two years, he had produced *Dances With Wolves* and *Silence of the Lambs*, and soon rose to president. Orion, founded by Columbia Law alumnus and social activist Arthur Krim, produced films with a social conscience, which became Platt’s personal preference as well.

After leaving Orion to become president of TriStar films, Platt “thought it was about time to do a movie about AIDS.” After discovering the legal case on which the award-winning film *Philadelphia* is based, he made that step, and the film helped bring AIDS awareness into the national dialogue, as well as making a major step forward in color-blind casting.

Platt’s career path has come full circle with his latest accomplishment, producing the Broadway musical *Wicked*. Based on Frank Baum’s *Wizard of Oz* novels, the musical combines Platt’s passion for theater and social commentary, as plays in general are, as he puts it, “very political.”

For his generous, honest, and inspiring discussion, the attending students gave Platt a standing ovation. “It was great to see an alumnus take a nontraditional career path and become extremely successful,” said Adam Dunst (’05). ■

The Annual Weinfeld Patrons’ Party



Weinfeld Patrons Dwight Opperman, Jack ('68) and Dolores Clarke



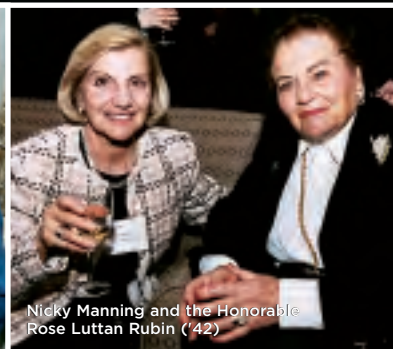
Herbert Rubin ('42), Diane Brandt Lewis, and Martin Lewis ('51) celebrate at Dean Revesz's and Professor Vicki Been's home.



Dean Richard Revesz and new Weinfeld Patron Mary Jean Potenzone (J.D. '74, L.L.M. '78)



Weinfeld Patron Jack M. Clarke ('68) in discussion with Professor Been ('83)



Nicky Manning and the Honorable Rose Luttan Rubin ('42)



Weinfeld Patrons Michael Eyowitz ('76), Eric Roth ('77) of Wachtell, Lipton, Rosen & Katz, and Kenneth Raisler ('76) of Sullivan & Cromwell

Dean's Strategic Council

Preparing for the next 10 years



Dean's Strategic Council members Jodi Saposnick Balsam ('86) and Robert Lemle ('78), in foreground, discuss topics for establishing future committees.

In 1990, a group of alumni convened to strategize about NYU School of Law's future. Under the leadership of then-Dean John Sexton (currently NYU president) and Law School Trustee Martin Payson ('61), the Council established a blueprint of ideas to guide the institution over the course of the next decade, a strategy that provided the foundation for the Law School's success as it solidified its reputation as the top global law school. After meeting with alumni across the country during the first year of his deanship, Dean Richard Revesz decided to resurrect that concept and draw from the deep well of resources the alumni community offers.

The Council brought together a group of professionals from a cross-section of alumni to strategize about the goals and aspirations of the NYU School of Law. The 78-member Council is chaired by Eileen FitzGerald Sudler ('74), general counsel of the Sudler Companies, a privately held construction and development concern. Sudler started her legal career as a criminal defense attorney for Legal Aid, later serving as assistant U.S. attorney for the Southern District of New York. She then worked in private practice before entering the real estate field with her husband, Peter Sudler ('73), president of the Sudler Companies and a trustee of the Law School.

The Council first convened on November 20, 2003, to identify key issues for the next decade.

At the opening session, Dean Revesz and Sudler reflected on the transformation of the Law School, marveling at how much was accomplished with relatively few resources—provoking a comparison from Sudler to the “little engine that could.”

During the daylong session, the Council heard from panels of faculty, students, administrators, and board members. The first panel of the day brought together faculty to discuss the practical application of scholarship. Five scholars—Noah Feldman,

associate professor of law; Gerald López, professor of clinical law; Michael H. Schill, then the Wilf Family Professor of Property Law and professor of urban planning, now dean of UCLA's law school; Stephen Schulhofer, Robert B. McKay Professor of Law; and Linda Silberman, Martin Lipton Professor of Law—discussed the challenges of connecting scholarship to the “real world.” They noted that the purpose of legal scholarship is to improve the ability of the legal system to deliver justice.

The faculty also fielded questions about how they fund their scholarship, the involvement of students, and the importance of the colloquia and weekly faculty workshops in identifying and developing research topics. Feldman identified a need for more specialized training of faculty members in how to acquire the funding they need to support their research. The implications of that change for the Law School are one of many issues the Council plans to consider.

A representative slice of the student population joined the Council for lunch to share their perspectives on the Law School. The group included: Erin Dow ('06), Filomen M. D'Agostino Scholar; Jeremy C. Marwell ('06), Furman Academic Scholar; Sonja Shield ('04), Sinsheimer Public Service Scholar; and Leila K. Thompson ('05), An-Bryce Scholar. When asked to explain why they chose the NYU School of Law, Shield responded: “It was the only place I visited where students said they actually enjoyed law school.” Others mentioned the strong intellectual community that they sensed during the recruitment and orientation sessions, the accessibility of the faculty, the energy and liveliness of the Law School, and the opportunities that New York City offers.



Lewis Steinberg ('84, LL.M. '92), chair of the Dean's Strategic Council Committee on the Graduate Tax Program, discusses issues and recommendations for the program.

After lunch, the Council broke into committees for the remainder of the day. They explored five areas identified as critical to the future of the Law School: alumni involvement (chaired by Shawn Creedon, '02, an associate at Fried, Frank, Harris, Shriver & Jacobson); business law (chaired by Brian Schorr, '82, executive vice president and general counsel of Triarc Companies); foreign LL.M. students (chaired by Rachel Finkle Robbins, '76, general counsel of Citigroup International); fundraising strategies (chaired by Kenneth Raisler, '76, a partner at Sullivan & Cromwell); and the graduate tax program (chaired by Lewis Steinberg, '84, LL.M. '92, a partner at Cravath, Swaine & Moore).

The whole Council next convened for a second day-long session on May 25, 2004. This time, they were able to meet in the new Lester Pollack ('57) Colloquium Room in Furman Hall, the Law School building that opened on January 12, 2004, on Sullivan and West Third streets.

The meeting kicked off with a panel to discuss the role of centers and institutes at the Law School, which currently houses 13 centers and five institutes that run the gamut from environmental and land-use law to transitional justice. Each serves to organize the work the faculty is doing by attracting leading policymakers and scholars, and involving students in the practical application of legal study. The Law School benefits from the institutions' exchange of ideas through conferences, workshops, journals, fellowships, and academic programs, all of which contribute to the vibrancy of the community.

Three faculty members and an executive director gave the group updates on the work of their centers or institutes. Participating in the discussion were Professor Stephen Holmes, co-director of the Center on Law and Security; Smita Narula, executive director of the Center for Human Rights and Global Justice; Professor Bryan Stevenson, who also serves as executive director of the Equal Justice Initiative of Alabama; and University Professor Joseph H. H. Weiler, director of the Jean Monnet Center for International and Regional Economic Law and Justice.

Their presentations provided a valuable opportunity for the Council to hear about the depth of the work being done at the Law School across a broad range of topics—from death penalty work and the impact of mass incarceration on culture to the balance between pursuing counterterrorism strategies and preserving civil rights. Throughout the remainder of the day's panels, as each committee chair reported on the progress of their information-gathering, the discussion would return to an issue raised in the first

panel. As Martin Gross (LL.M. '81) commented during a subsequent conversation on alumni involvement, "It's important for our alumni to know that the Law School is playing an important role in some of the most complex social issues our nation and world faces. The stories we heard this morning are compelling not only for the facts, but for

how clearly the institution, through the faculty and centers, has established a distinct voice in trying to address these issues intelligently and attract attention to them."

The Council will reconvene in November to solidify their recommendations for inclusion in a strategic plan that should be unveiled by the end of the academic year. ■

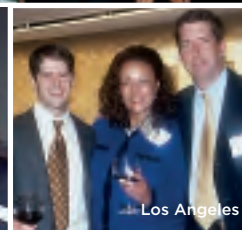
Alumni Gatherings



Mexico



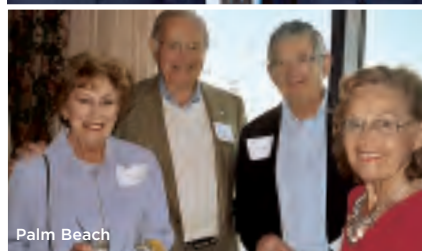
Rio



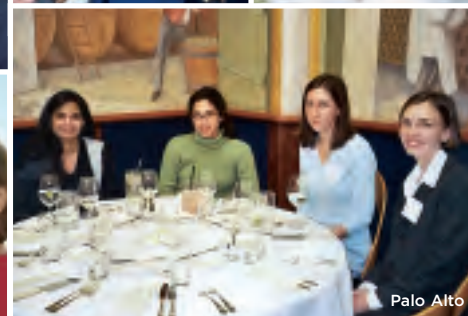
Los Angeles



Boston



Palm Beach



Palo Alto

Left to right, from top:

The active and dedicated Mexican NYU School of Law Alumni Association proudly hosted Dean Richard Revesz in Monterrey last spring.

The alumni lunch in Rio de Janeiro, Brazil, was one of many throughout the Americas, demonstrating the school's international reach.

A great turnout for the dean at the St. Regis in Los Angeles.

At the Bay Tower in Boston, alumni listened as Dean Revesz presented his "State of the Law School" address.

The 20th annual alumni lunch in Palm Beach, Florida, drew graduates from all over the Sunshine State.

Exchanging news over lunch at Spago in Palo Alto was a delightful way for these alumnae to get an update from the dean.



ffering an exciting ride through the past, the critically acclaimed PBS series *Liberty's Kids* makes American history come to life for young TV fans, managing to pull off being fun *and* educational. Pulitzer prize-winner Jack Rakove (cartoon version, left), who was a visiting professor at the NYU School of Law last year and is the W.R. Coe Professor of History and American Studies at Stanford University, was responsible for the accuracy of the animated show, vetting all of *Liberty's* scripts before they were produced. A font of the indelible facts that form the bedrock of the serie's dramatic storytelling, the professor made sure that *Liberty's* two apprentices, Sarah and James, seen working here in Ben Franklin's print shop, are trustworthy purveyors of history. An A-list roster of celebrities—Annette Bening, Ben Stiller, Sylvester Stallone—provide the historical figures' voices, with Walter Cronkite speaking Franklin's lines.



Save the Date!

Reunion 2005

April 9, 2005

Bringing together the classes of 1955, 1960, 1965, 1970, 1975, 1980, 1985, 1990, 1995, and 2000, the Golden Circle, and all alumni with an LL.M. in Taxation to celebrate Reunion 2005 and the Graduate Tax Program's 60th Anniversary.

Join your friends and classmates to celebrate the anniversary of your Law School graduation and the Graduate Tax Program's 60th Anniversary. Look for your invitation in the mail or check the Web site at www.law.nyu.edu/alumni. We're looking forward to having you join us! If you have any questions, call (212) 998-6470 or send an email to law.reunion@nyu.edu.

2004-05 Alumni Events Calendar

For the most up-to-date calendar listing,
visit our Web site at www.law.nyu.edu.

September 2004 International Tax Program at the International Fiscal Association (Vienna, Austria)
30th Annual Bankruptcy Workshop
An-Bryce Inaugural Chair Lecture
Graduate Tax Program Alumni Reception (Washington, D.C.)
Dorothy Nelkin Lecture

October 2004 David R. Tillinghast Lecture
Delaware Alumni Luncheon
Brennan Center Legacy Awards Dinner
James Madison Lecture
Annual BLAPA Mentorship Reception
National Center on Philanthropy and the Law Annual Conference

November 2004 Derrick Bell Lecture
Law Alumni Association Fall Lecture/
Weiss Public Service Forum
Annual Scholarship Reception
KPMG Lecture

December 2004 Recent Graduate Holiday Happy Hours (Los Angeles and Washington, D.C.)

January 2005 AALS Reception for Alumni in Education (San Francisco)
Legal Ethics Workshop presented by Professor Stephen Gillers
Weinfeld Gala
Attorney General Robert Abrams Public Service Forum
Brennan Lecture with the Honorable Ronald M. George
Annual Alumni Luncheon (New York)

February 2005 Dwight D. Opperman Inaugural Chair Lecture
Recent Graduate Cocktail Reception (New York)
Public Interest/Public Service Legal Career Symposium
San Francisco Alumni Reception
Los Angeles Alumni Reception
Palo Alto Alumni Luncheon
Public Service Auction
Wallace-Lyon National Tax Workshop (Orlando)

March 2005 ICRC/NYU Seminar
Hauser Global Law School Program Tenth Anniversary Reunion
Boston Alumni Luncheon

April 2005 BLAPA Spring Dinner
Graduate Tax Workshop
Reunion
Gala Dinner in Honor of the 60th Anniversary of the Graduate Tax Program
Washington, D.C. Alumni Luncheon
Dean's Cup Basketball Game

May 2005 Nicholas J. Healy Lecture
Convocation
Denver Alumni Reception
58th Annual Conference on Labor

June 2005 NYU Directors' Institute

August 2005 IJA and Alumni Breakfast during the ABA Meeting (Chicago)



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